Supreme Court of the United States

OCTOBER TERM, 1970

No. 6061

JACK L. MAYER,

Appellant,

—v.—

CITY OF CHICAGO

APPEAL FROM THE SUPREME COURT
OF THE STATE OF ILLINOIS

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 11, 1969	Defendant charged with "Disorderly Conduct" and "Interfering with a Police Officer".
January 12, 1970	Jury Trial begins in the Circuit Court of Cook County, Criminal Division.
January 14, 1970	Jury Trial ends, Finding of Guilty on both charges, Judgment entered on Verdicts. Defendant fined $250.00 on each charge.
February 3, 1970	Defendant's Post-Trial Motion for Judgment N.O.V., A New Trial, and Reduction of Sentence is denied. Among grounds urged were prejudicial misconduct of prosecutor and insufficiency of the evidence.
February 24, 1970	Defendant's Motion for, *inter alia*, a transcript without cost is denied "on the ground that defendant was found guilty of ordinance violations and that rule 607 of the Supreme Court applies only to felony cases." The finding of the Court that Defendant is indigent was inadvertently omitted from the order.
February 25, 1970	Notice of Appeal to Supreme Court of Illinois filed.
March 5, 1970	Praecipe filed in Circuit Court requesting that the record on appeal, including the transcript, be compiled.
March 24, 1970	Motion for, *inter alia*, a Transcript without cost, Affidavit, Brief in Support of Motion, and Supplemental Statement are filed with the Supreme Court of Illinois, by Justice Ward, and after hearing, the Motion and supporting documents are referred to the full Court for disposition.

DOCKET ENTRIES—(Continued)

September 18, 1970	Supreme Court of Illinois denies that portion of Appellant's Motion requesting a transcript without cost. That part of the Motion requesting waiver of filing fees is allowed.
October 2, 1970	Defendant's Motion for Completion of the Record on Appeal is granted and the Circuit Court enters of record the prior finding of February 24, 1970 that Defendant is indigent.

THE UNITED STATES OF AMERICA

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

STATE OF ILLINOIS)
) ss.
County of Cook)

Pleas, Proceedings and Judgment, before The Circuit Court of Cook County, Illinois, in the City of Chicago, in the County of Cook and State of Illinois, in the year of our Lord, one thousand nine hundred and seventy and the Independence of the United States, the one hundred and ninety fourth

Present: Honorable John A. Ouska, One of the judges of the court

EDWARD V. HANRAHAN,
State's Attorney

JOSEPH I. WOODS,
Sheriff

Attest: MATTHEW J. DANAHER, Clerk.

Be it Remembered, to wit: that on the 14th day of January 1970, the following among other proceedings were had in said court and entered of record therein, to-wit:

No. 69 MC1 605359 Quasi-Criminal

CITY OF CHICAGO, a municipal corporation,

v.

JACK L. MAYER

Now come the parties to this cause, also come twelve lawful jurors of a jury, who are duly elected, tried and sworn, to well and truly try the issues herein and a true

verdict render according to the evidence, and said jury, after hearing the verdict and the arguments of counsel, retire to consider of their verdict, and after due deliberation thereon had, they return into open Court the following verdict, to-wit:

> "WE, THE JURY, FIND THE DEFENDANT, JACK L. MAYER, GUILTY OF VIOLATING CHAPTER 11, SECTION 33 (INTERFERING WITH A POLICE OFFICER) OF THE MUNICIPAL CODE OF THE CITY OF CHICAGO, AS AMENDED."

This cause coming on for further proceedings herein, it is considered by the Court that the plaintiff have judgment on the verdict herein and that the plaintiff have and recover of and from the defendant, JACK L. MAYER, the damages of the plaintiff amounting to the sum of TWO HUNDRED FIFTY and no/100 DOLLARS ($250.00) in form as aforesaid assessed and that execution issue therefor.

Stay of mittimus to March 13, 1970.

THE UNITED STATES OF AMERICA

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

STATE OF ILLINOIS)
) ss.
County of Cook)

Pleas, Proceedings and Judgment, before The Circuit Court of Cook County, Illinois, in the City of Chicago, in the County of Cook and State of Illinois, in the year of our Lord, one thousand nine hundred and seventy and the Independence of the United States, the one hundred and ninety fourth

Present: Honorable John A. Ouska, One of the judges of the court

EDWARD V. HANRAHAN,
State's Attorney

JOSEPH I. WOODS,
Sheriff

Attest: MATTHEW J. DANAHER, Clerk.

Be it Remembered, to wit: that on January 14, 1970, the following among other proceedings were had in said court and entered of record therein, to-wit:

No. 69 MC1 605358 Quasi-Criminal

CITY OF CHICAGO, a municipal corporation,

v.

JACK L. MAYER

Now come the parties to this cause, also come twelve lawful jurors of a jury, who are duly elected, tried and sworn, to well and truly try the issues herein and a true

verdict render according to the evidence, and said jury, after hearing the verdict and the arguments of counsel, retire to consider of their verdict, and after due deliberation thereon had, they return into open Court the following verdict, to-wit:

> "WE, THE JURY, FIND THE DEFENDANT, JACK L. MAYER, GUILTY OF VIOLATING CHAPTER 193, SECTION 1 (A) (DISORDERLY CONDUCT) OF THE MUNICIPAL CODE OF CHICAGO".

This cause coming on for further proceedings herein, it is considered by the Court that the plaintiff have judgment on the verdict herein and that the plaintiff have and recover of and from the defendant, JACK L. MAYER, the damages of the plaintiff amounting to the sum of TWO HUNDRED FIFTY and no/100 DOLLARS ($250.00) in form as aforesaid assessed and that execution issue therefor.

It is ordered that the mittimus be and the same is hereby ordered stayed to March 13, 1970.

(Court Date)

... ANAHER, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

QUASI-CRIMINAL

THE CIRCUIT COURT OF COOK COUNTY

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

CITY OF CHICAGO,
A MUNICIPAL CORPORATION, COMPLAINT

No.

v.

Jack L. MAYER
Defendant

James T. Breckenridge
(Complainant's Name Printed or Typed) complainant, now appears before the Circuit Court of Cook County and states that Jack L. Mayer (defendant) has, on or about 11 Oct 1969 (date) at Madison & Clark (place of offense) Chicago, Cook County, Illinois, committed the offense of Interfering (offense) in that he

11-33 ☒ Did knowingly resist, obstruct, or interfere with one known to be a police officer in the performance of his duties.

192-27 ☐ Did own a dog at _____ in the City of Chicago and did unlawfully fail to procure a license for said dog.

192-4 ☐ Being a minor, _____ years of age, was intoxicated or did purchase, offer to purchase, or unlawfully obtain for his personal use an intoxicating liquor.

192-1 ☐ Did keep or maintain, patronize or frequent or was an inmate of a house of ill fame or assignation or place for the practice of fornication, prostitution or lewdness.

192-5 ☐ Did solicit to prostitution upon the streets of Chicago or other public places, one _____ _____ for the price of $ _____ at, to-wit: _____

192-6 ☐ Being a habitual drunkard, or person known to be a prostitute or one who aids or abets prostitution or person previously convicted of a felony or prostitution and who did assemble with persons of the fore-going classes on the public way or in a public place or did frequent, loiter or loaf in a premises where intoxicating liquors are sold.

192-29 ☐ Did discharge a gun, pistol or other fire-arm in the city.

In violation of Chapter _____ Section _____ of the Municipal Code of The City of Chicago.

James T. Breckenridge
(Complainant's Signature)

2nd DISTRICT
(Complainant's Address) (Telephone No.)

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

James T. Breckenridge
(Complainant's Name Printed or Typed)

being first duly sworn, on _____ oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

James T. Breckenridge
(Complainant's Signature)

Subscribed and sworn to me before me _____, 19__.

_____
(Judge or Clerk)

ORDER FOR WARRANT

I have examined the above complaint and the person presenting the same and have heard evidence thereon and am satisfied that there is probable cause for filing same. Leave is given to file said complaint. Warrant to issue.

Bail fixed at $_____

JUDGE

ORDER FOR LEAVE TO FILE COMPLAINT (ARREST WITHOUT WARRANT)

I have examined the above complaint. Leave is given to file said complaint.

Bail fixed at $ 250.00

JUDGE John A. Swarthout

BEST AVAILABLE COPY

(Court Branch) (Court Date)

MATTHEW J. DANAHER, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

(MMC-2)

QUASI-CRIMINAL

STATE OF ILLINOIS } ss
COUNTY OF COOK }

THE CIRCUIT COURT OF COOK COUNTY

CITY OF CHICAGO
A MUNICIPAL CORPORATION,
PLAINTIFF

COMPLAINT

No.

v.

Jack L. MAYER
Defendant

James T. Breckenridge
(Complainant's Name Printed or Typed) complainant, now appears before

the Circuit Court of Cook County and states that Jack L. MAYER
(defendant)

has, on or about 11 Oct 1969 (date) at MADISON & Clark (place of offense)

Chicago, Cook County, Illinois

Committed the offense of **Disorderly Conduct** in that he knowingly

☒ a) Did any act in such unreasonable manner as to provoke, make or aid in making a breach of peace.

☐ b) Did or made any unreasonable or offensive act, utterance, gesture or display which, under the circumstances, creates a clear and present danger of a breach of peace or imminent threat of violence.

☐ d) Failed to obey a lawful order of dispersal by a person known by him to be a peace officer under circumstances where three or more persons are committing acts of disorderly conduct in the immediate vicinity, which acts are likely to cause substantial harm or serious inconvenience, annoyance or alarm.

☐ e) Assembled with three or more persons for the purpose of using force or violence to disturb the public peace.

☐ f) Was begging or soliciting funds on the public ways.

☐ g) Appeared in any public place manifestly under the influence of alcohol, narcotics or other drug, not therapeutically administered, to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.

☐ h) Carried in a threatening or menacing manner, without authority of law, any pistol, revolver, dagger, razor, dangerous knife, stiletto, knuckles, slingshot, an object containing noxious or deleterious liquid, gas or substance or other dangerous weapon or concealed said weapon on or about the person or vehicle.

In violation of Chapter 193 Section 1 4 (Subsection) of The Municipal Code of The City of Chicago.

James T. Breckenridge
(Complainant's Signature)

2nd DISTRICT
(Complainant's Address) (Telephone No.)

STATE OF ILLINOIS } ss.
COUNTY OF COOK }

JAMES T. BRECKENRIDGE
Complainant's Name Printed or Typed

being first duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true:

James T. Breckenridge
Complainant's Signature

Subscribed and sworn to before me _____, 19____.

_____
Judge or Clerk

ORDER FOR WARRANT

I have examined the above complaint and the person presenting the same and have heard evidence thereon and am satisfied that there is probable cause for filing same. Leave is given to file said complaint. Warrant to issue.

Bail fixed at $_____

JUDGE _____

ORDER FOR LEAVE TO FILE COMPLAINT (ARREST WITHOUT WARRANT)

I have examined the above complaint. Leave is given to file said complaint.

Bail fixed at $ 250.00

JUDGE Allan A. Charles

BE IT REMEMBERED, that afterwards, to wit: on the 11th day of October, 1969, the following among other proceedings were had and entered of record in said court which proceedings were and are in words and figures following to-wit:

PRESENT HONORABLE JOHN A. OUSKA, one of the judges of the court

EDWARD V. HANRAHAN,
States Attorney

JOSEPH I. WOODS,
Sheriff

MATTHEW J. DANAHER,
Clerk

No. 69 MC1 605359 Quasi-Criminal

CITY OF CHICAGO, a municipal corporation,

v.

JACK L. MAYER

DRAFT ORDER

CCC-2-E ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

MUNICIPAL (COUNTY) (MUNICIPAL) DEPARTMENT FIRST DISTRICT (DIVISION) (DISTRICT)

☒ The People of the State of Illinois

☐ The City of Chicago, a Municipal Corporation

v.

JACK L. MAYER
Defendant

Court Complaint No. 605359

ENTERED IN SPECIAL ORDER BOOK 53 PAGE 219

BOND ORDER

ORDER

The Defendant Jack L Mayer (Name)

whose address is 334 East 25th pl (Number and Street) New York City (City and State)

having been arrested on the charge of 193-1-A (Offense)

IT IS HEREBY ORDERED that bail is set at $ [illegible]

IT IS FURTHER ORDERED that said defendant having neglected and failed to give bail be held by the Sheriff of Cook County, Illinois and that the Sheriff safely keep him until said defendant give bail as required, or until his court appearance at 2600 South California (Location)

Chicago, Illinois before Branch 47 in Room 1

on 10/23/69 (Date) at 2:00 (Time) ☐ AM ☒ PM

NOV 11 1969, 19

ENTER:

Judge

[illegible], CLERK OF THE CIRCUIT COURT OF COOK COUNTY

572

-5a-

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IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS,
MUNICIPAL DIVISION

Nos. 605358, 605359

[Filed, Municipal Court of Chicago, First Municipal District of Circuit Court, Cook County, Jan. 30, 1970, Matthew J. Danaher, Clerk of Court]

THE CITY OF CHICAGO, PLAINTIFF,

v.

JACK L. MAYER, DEFENDANT

POST-TRIAL MOTION

Defendant Jack Mayer was charged by the City of Chicago with violation of two city ordinances: "disorderly conduct," in that he "knowingly . . . did any act in such unreasonable manner as to provoke, make or aid in making a breach of peace," and interfering with a police officer, in that he "did knowingly resist, obstruct or interfere with one known to be a police officer in the performance of his duties." (*C.f.*, Municipal Code of Chicago, Ch. 193, Sec. 1(a); Ch. 11, Sec. 11-33.)

A jury trial was held before the Honorable Judge Ouska on January 12 through January 14 and the defendant was found guilty on both counts. Defendant now makes a timely motion under Section 68.2 of the Civil Practice Act seeking a judgment *non obstante veredico* or, in the alternative, a new trial. Defendant also seeks to set aside one of his fines. This motion shall stand for earlier oral motions made for a directed verdict.

A. *The evidence in the case does not support the verdict.*

Based upon the following undisputed and uncontroverted facts in the record, this court should enter a judgment notwithstanding the verdict.

1. The defendant came to Chicago on request as a member of the Medical Committee for Human Rights, in order to provide a medical presence in case of illness or injury.

2. Defendant did not participate in the march itself, but was an onlooker.

3. At the intersection of Madison and La Salle Streets the defendant came upon an apparently injured man lying on his back in the middle of the street.

4. Defendant had never seen this man before.

5. The line of march had already broken and proceeded east down Madison Street. There were between 60-100 police in the immediate area of the apparently injured victim, some of whom had demonstrators in their custody, but the bulk of whom were stationary.

6. Defendant, a third-year medical student from New York University, performed a brief neurological examination of the victim, ascertaining that he was alert, had been struck in the back, could not move his toes and legs and had no sensation in them, and had no deep pain reflexes. At this point, the examination was interrupted by the police. Based upon this information, defendant diagnosed a possible spinal injury to this patient.

7. A highly experienced and knowledgeable doctor testified as an expert witness that defendant's diagnosis was medically correct, and that based upon what the defendant knew at the time, if the victim were improperly moved, further severe spinal injury could reasonably result which might be permanent and completely disabling.

8. The defendant in an emphatic voice either (a) told the police not to move the victim (one police version), or (b) told police not to move the victim without an orthopedic stretcher because he had a "possible spine injury" (the defense version). He also said: "They (the police) don't care about him (the victim)."

9. When the police started to (a) lift the victim to the sidewalk, three on each side (one police version), or (b) drag the victim away, one policeman holding him by each limb (defense version),

10. Defendant, kneeling by victim's left shoulder, either (a) placed on hand on the victim's stomach, "pushing" an officer glancingly with the other (police version), or (b) placed both hands on the stomach of the victim in an effort to keep the injured back stable (defense version).

11. Defendant so acted solely to protect the victim from possible severe further harm, including permanent and total paralysis, which he and the expert witness thought reasonably might have resulted from the police method of carrying the injured man. The doctor testified as an expert witness as to these dangers and gave his opinion that the police method of transportation was medically unsafe and reasonably might have caused severe harm.

12. An official police training bulletin sent to and supposed to be followed by every police officer, introduced into evidence at trial, stated: "*Never, never, never* move an injured victim unless absolutely necessary." Officers are subject to discipline for violating these official bulletins. It was apparent to the officers that the victim was injured.

13. The purported reason for moving the victim was either (a) to clear the streets for traffic, or (b) so a column of police could march down the street (both police versions). There were numerous police in the immediate area (60-100—police estimate) and there were some demonstrators clustered in groups of four on various street corners. The mass of the march, estimated at some 150-200 persons, was some distance away, moving away from the scene. There was no disturbance at this time.

From these undisputed facts, the jury could not reasonably find against, and this court should enter a judgment notwithstanding the verdict for, defendant Jack Mayer. There is insufficient evidence to convict defendant on either charge. The evidence is so insubstantial that due process of law requires judgment for the defense. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960).

B. *Neither ordinance was intended to cover such beneficially-motivated, non-violent conduct.*

This court should enter judgment for the defendant because the facts show that, in attempting to hold the victim's back immobile, he acted with intent to prevent greater harm to the victim, his patient, and with intent to assist the police rather than hinder them in the proper performance of their duties. Neither the "disorderly conduct" ordinance nor the "interfering" ordinance was intended to reach such conduct. The "disorderly conduct" ordinance is aimed at safeguarding the general peace of the community and the interests of other persons in being free from unreasonable disruptions in their lives or in the pursuit of their legitimate activities. The "interfering" ordinance is aimed at safeguarding policemen and police operations and making them efficient. Neither ordinance was intended to be a "catch-all" encompassing the reasonable activities of citizens in their interactions with the police. Thus, although it "interferes" with police conduct, arguing or "remonstrating with an officer in behalf of another is not an offense." See 39 Am. Jur. "Obstructing Justice", § 10. Similarly, the "interfering" ordinance was not intended to encompass non-violent interferences for beneficial purposes. The ordinance does not make it an offense to stop a police officer from unknowingly entering a room to arrest someone waiting to shoot the officer. Neither is it an offense to hinder an officer from unwittingly opening a booby-trapped call box, or for a mother to attempt to stop an officer from unknowingly backing his vehicle over her baby who has crawled out into the street. Furthermore, the disorderly conduct ordinance only proscribes "unreasonable" conduct leading to a "breach of peace"; defendant's conduct here was neither "unreasonable" nor did it "provoke, make or aid in making a breach of peace" as the City Council intended these words to be construed.

C. *This court should enter judgment for the defendant because the requisite elements of the charge were not proven.*

Both ordinances require that defendant's conduct be "knowing." "Knowing" is defined in the Illinois Criminal Code as "when [defendant] is consciously aware that his conduct is of such nature [as is proscribed by the ordinances]." (See 38 Ill. Rev. Stat., § 4-5.) And in *The People* v. *Raby*, 40 Ill. 2d 392, 395 (1968), in reference to the state "disorderly conduct" statute, Justice Schaefer said:

> "The word 'knowingly' describes a consciousness and deliberation which negatives accident or mistake."

Defendant Mayer was not "consciously aware" that his conduct was obstructive or interfering rather than helpful and assisting. Defendant's conduct was aimed at preventing grave injuries to the victim and preventing possible liability on the part of the officers. It is an element of the "interfering" ordinance that the officers' conduct must be "official" or "authorized." The "knowing" requirement applies to this element as to all the others. The apparently willful maltreatment of victims in their custody by policemen is neither "official" nor "authorized" conduct. Defendant therefore could not have been and was not "consciously aware" that his conduct was doing anything other than preventing greater harm to another and helping the policemen to avoid discipline, and possible civil and criminal liability. Defendant, a highly-trained physician, was greatly disturbed at the callous and illegal conduct of the officers, and had a medical duty to act non-violently for the benefit of the injured victim. His hindrance of the police, such as it was, was not "knowing" within the meaning of the ordinance, and the jury could not properly so have found.

D. *It was error to refuse defendant's instructions on necessity.*

Defendant tendered to the court instructions, which were refused, setting out the defense of "necessity" in the words of the Illinois statute:

> "Conduct which would otherwise be an offense is justified by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct." (38 Ill. Rev. Stat., § 7-13.)

The "Committee Comments" to this section of the Criminal Code make clear that its intended application was not limited to offenses covered by that Code; indeed one of the suggested applications is to the "violation of speed limit in pursuit of criminal" and another is for "a druggist dispensing a drug without the requisite prescription to alleviate distress in an emergency."

This statute only codifies and enunciates as a policy of the State of Illinois the long-standing common law defense of necessity. As the committee states, "Necessity as a justification for crime has long been known to the law." The most famous instances of its use, of course, involved situations where one of a group in common distress was murdered to preserve the lives of the others. See *United States* v. *Holmes*, 26 Fed. Cases 360, No. 15,383 (C.C. Pa. 1842); *Regina* v. *Dudley and Stevens*, 14 Q.B.D. 273, 15 Cox C.C. 624 (1884). See also 22 C.J.S., Criminal Law, § 49, pp. 185-186.

The necessity doctrine was applied and discussed by the U.S. Supreme Court in *United States* v. *The Diana*, 7 Wall 354, 19 L. Ed. 165 (1868), a case quite similar to that presented here. In that case a schooner, in violation of a federal statute, entered an area that had been declared blockaded. The government sued for confisca-

tion under the blockade law and the defense was that the entry was necessary because of the boat's condition of distress. The Supreme Court accepted the applicability of the common law necessity defense in that statutory action on the basis of evidence showing that the rigging was broken and needed repair, but the court found as a fact that the skipper intended to "trade with the enemy" in violation of the blockade law, and also that the injuries were "not such as would endanger the safety of the vessel." The Supreme Court indicated that the defense would have prevailed if the ship had been out of provisions or was leaking and had no alternative but to violate the blockade. *The Diana* is direct authority for the use of the necessity defense in this case.

It is the law of this state that any valid defense may be raised as a defense to an ordinance violation unless otherwise specifically indicated. See 10 Ill. Law & Prac., "Cities, Villages," § 1194; 62 C.J.S., "Municipal Corporations," § 319. Nothing in either the disorderly conduct or the interfering ordinances here suggests an intent to do away with the necessity defense, no more than the defense of self-defense. Would anyone suggest that it is disorderly conduct under the city's ordinance to defend oneself from physical attack from a stranger? Or is it "interfering" to interrupt an officer in the ways described under B above? Just as the ordinances include self-defense by their silence, so do they include the necessity defense. It would be a frightening world otherwise.

Self-defense and the necessity defense expressly apply to the "interfering" and "disorderly" sections of the Illinois Criminal Code, *upon which the city's ordinances in this case are based* (see 38 Ill. Rev. Stat., §§ 31-1, 26-1), and § 7-13 expresses a strong state policy in favor of the general utility of the necessity defense in any penal proceeding in this state. Labelling this prosecution "quasi-criminal" should not blind the court to essences. It was a matter of whim or chance that this was not a

state prosecution under the identical state statutes. Defendant here faces a penal fine which may be well in excess of his ability to pay, and the ordinances which he is charges with violating are directed towards personal conduct of the sort normally associated with criminal actions. If he cannot pay, he may be imprisoned for up to six months. 24 Ill. Rev. Stat., § 1-2-9. If these are not penal sanctions, nothing ever is.

It is basic that municipal ordinances should not in- N.E.2d —— (1966). In the *Town of Cicero*, case, *Weilander*, 35 Ill. App. 2d 456, 183 N.E.2d 40 (1962); *U.S. Brewing* v. *Alsip*, 81 Ill. App. 2d 235, 243, —— N.E.2d —— (1966). In the *Town of Cicero*, case, *supra* at 467, the Appellate Court said:

> "Municipal authorities cannot under a general grant of power adopt or pass ordinances which infringe on the spirit of the State law or which are repugnant to the policy of the State as declared by its general regulations, but the police regulation of a municipality may differ from those of the State on the same subject if they are not inconsistent therewith."

There is nothing in the Municipal Code of 1961 or these ordinances themselves to suggest that the overriding policy expressed in 38 Ill. Rev. Stat. § 7-13 was meant to be infringed (see 24 Ill. Rev. Stat., §§ 11-5-2, 11-5-3, 11-1-1). This court should not endanger the validity of these ordinances by bringing them into conflict with the overriding state statutory policy.

Neither should this court be troubled with the fear that permitting the defense of necessity in this case would open the door to untold defenses in traffic, pollution or similar cases arising under other municipal ordinances, the result of which would be a frustration of their purposes. These other ordinances might well manifest an intention that such a defense as necessity is inapplicable, or that under some circumstances absolute liability ob-

tains. Each ordinance stands on its own policies and purposes. But absolute liability, or an absence of normal defenses, was not the intended result of the ordinances under which defendant was charged. The purposes of the ordinances are not frustrated, but are furthered by the inclusion of the necessity defense. This conclusion is the more obvious when it is considered that the state "disorderly conduct" and "interfering" statutes, upon which the city's present ordinances were modeled, expressly provide for the necessity defense, and no one questions but that their purposes are furthered and amplified, rather than frustrated, by this inclusion. The absurdity of the city's position is further suggested by the fact that the necessity defense is of unquestioned validity in a state prosecution, where the consequences are more severe and the state's interest in protecting against the various harms is greater. Surely the defense must also obtain where the consequences and the government's interest are less.

Furthermore, while with a pollution or traffic ordinance dispensing with the defense of necessity, a reasonable connection may exist between the exercise of proper police powers and purposes and the method applied for regulating or enforcing those purposes, no such reasonable connection exists in this case. To dispense with the defense of necessity here would violate due process of law. See *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962).

E. *If necessity is no defense and defendant's conduct was intended to be included within the scope of the ordinances then the ordinances are over-broad and unconstitutional.*

Statutes and ordinances should be construed where possible to be valid and constitutional. See *Du Bois* v. *Gibbons*, 2 Ill. 2d 392, 410 (1954). The constitutional and statutory conflict problems in this case could be avoided by following the natural construction of the law, which would permit the defense of necessity or indicate

that conduct such as defendant engaged in here is not within the scope of these ordinances. If, however, the court should conclude to the contrary, then it must squarely face the vague and dangerously broad unconstitutional reach of the monsters it has created. Even innocent "interferences" and "disorderly conduct," or conduct compelled by beneficial purposes of all sorts, would be brought within their prohibitions. Judge Will has already indicated that such a construction would render these ordinances unconstitutional. See *Landry* v. *Daley*, 280 F. Supp. 968, 973 (N.D. Ill. 1968). A women screaming to stop a policeman from driving a vehicle over her child would be guilty of "disorderly conduct"; the Good Samaritan stopping a policeman from getting shot by the concealed killer would be guilty of "interfering"; everyday beneficial conduct by untold millions of citizens would suddenly become violations of the law. It is clear that defendant's participation in this march, such as it was, was protected by the First Amendment. See *Gregory* v. *City of Chicago*, —— U.S. ——, 89 Sup. Ct. 946, 947 (1969). His treating the injured man was the act of a Good Samaritan. To convict and penalize him for his conduct under such shotgun ordinances violates due process of law.

F. *It was error to refuse defendant's instruction on the meaning of "breach of peace."*

The defense tendered to the court an instruction on "breach of peace," which was refused. None other was substituted and no attempt was made by the court or prosecutor to supply an alternative. Without such explication, this phrase is unconstitutionally vague and meaningless. While it has been held that the inclusion of such a phrase in a statute may be permitted without violating the Constitution (see *The People* v. *Raby*, 40 Ill. 2d 392 (1968)), this defendant was denied his right to due process of law by the failure to instruct the jury on the meaning of "breach of peace" as reflected by the

facts in evidence. It is not a violation of the Constitution to talk or argue with an officer, although this might be considered to "breach the peace." Remitting the definition of this phrase to the jury's unbridled discretion, unguided by standards or carefully drawn instructions based upon the facts of the case, is a violation of the specificity requirement in due process, subjects defendants to wholly undefined and arbitrary criminal and "quasi-criminal" liabilities, and permits the jury to convict for constitutionally protected acts. See *Gregory* v. *City of Chicago*, —— U.S. ——, 89 Sup. Ct. 946 (1969); *Stromberg* v. *California*, 283 U.S. 359 (1931); *Shuttlesworth* v. *City of Burmingham*, 382 U.S. 87, 90 (1965); *Edwards* v. *South Carolina*, 372 U.S. 229, 237-238 (1963); *NAACP* v. *Button*, 371 U.S. 415, 433, 475 (1963).

G. *Defendant was denied a fair trial.*

The conduct of the trial, especially the conduct of the prosecution; denied the defendant his constitutional right to a fair trial. The prosecutor put on as his first witness someone whose testimony consisted solely of background, duplicative of that which could have been and was given by the other officers who testified. The sole apparent function of this testimony was to bring two absolutely irrelevant and highly prejudicial facts before the jury: the first fact was that Richard Elrod was injured at about the same time during the same demonstration; the second fact was that the marchers, of whom defendant was not even one, were chanting apparently pro-North VietNamese slogans such as "Ho Chi Mihn." The facts about Richard Elrod's injury and his connection to the demonstration have been spread over the newspapers of the City of Chicago with some consistency since the 11th of October, 1969. The deliberate, irrelevant mentioning of his name before the jury could do nothing but hang this defendant regardless of the facts of his case. And the stressing of the "traiterous" and "anti-American" chant made a political trial out of an otherwise neutral state of facts. Although these comments were stricken

from the record, they were never stricken from the jury's mind. The apparent bad faith of the prosecutor in eliciting these questions compells reversal and the grant of a new trial. *C.f., Giles* v. *Maryland*, 386 U.S. 66 (1967); *Brady* v. *Maryland*, 373 U.S. 83 (1963) (use of perjured testimony).

Moreover, the prosecutor relied almost exclusively in his closing arguments to the jury on facts not fairly inferable from the evidence or within the proper scope of argument. These "facts" related to hypothetical violent and destructive acts by some unknown demonstrators, and to the defendant's alleged involvement in a conspiracy to disrupt Chicago. Nothing in the record even approached supporting such gross and prejudicial fancies. The bad faith of the prosecutor and his highly-prejudicial and improper argument, combined with the grossly prejudicial infection of the trial by the mention of Elrod and the political chants, require in the interests of justice and due process of law that defendant be given a fair trial. See *Paulsen* v. *Gateway Transportation Co., Inc.*, —— Ill. App. 2d ——, No. 69-41, Second District, Nov. 4, 1969 (prejudicial conduct of plaintiff's counsel in closing argument denied defendant a fair trial); *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935).

H. *It was error to refuse defendant's instructions on a reasonable doubt.*

The court refused defendant's tendered instructions based upon a reasonable doubt burden of proof. Such a standard must apply for prosecutions under these ordinances. They are penal in nature. They seek to impose sanctions for certain kinds of personal, public conduct of the kind normally denominated "criminal." Changing the sign on the door does not make a jail any less a jail. There are here no compensating interests or policies compelling dilution of the ordinary guarantees before penal sanctions are imposed. See *In re Gault*, 387 U.S. 1 (1967); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Speiser* v. *Randall*, 357 U.S. 513, 524-525 (1958).

I. *It was error to sentence defendant on both charges arising out of the same conduct.*

Defendant was fined $250 on each charge, but both charges resulted from the same identical act—placing his hand on the victim's stomach. It is axiomatic that a court cannot impose double penalties for the same conduct. See *City of Chicago* v. *Hill*, 40 Ill. 2d 130, 136 (1968); *People* v. *Raby*, 40 Ill. 2d 392, 404 (1968). Therefore, defendant's fine for interfering or disorderly conduct must be set aside.

Whereupon defendant requests this court to enter a judgment in his favor notwithstanding the verdict or, in the alternative, the grant of a new trial on these charges. Defendant also requests that his fine be reduced from $500 to $250 to avoid double punishment.

Defendant,

By /s/ Henry F. Field
HENRY F. FIELD
231 South La Salle Street
Chicago, Illinois 60604
STate 2-0600
His Attorney

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS,
MUNICIPAL DIVISION

Nos. 605358, 605359

[Filed, Municipal Court of Chicago, First Municipal District of Circuit Court, Cook County, Jan. 30, 1970, Matthew J. Danaher, Clerk of Court]

THE CITY OF CHICAGO, PLAINTIFF,

v.

JACK L. MAYER, DEFENDANT

ORDER

This matter coming on upon the motion of defendant by his attorney for a hearing and decision on a post-trial motion for judgment *non obstante veredicto* or, in the alternative, a new trial, and also for the setting aside of part of one of the two fines imposed, it is ordered that:

1. judgment is hereby entered for the defendant notwithstanding the verdict,
2. the defendant is granted a new trial, and
3. the fine of $250 as to the offense of _____ is set aside.

Entered this —— day of _____, 1970.

By _____
HONORABLE JOHN OUSKA

Denied.

Sheet No. _____

Line No. _____

No. 69 MC 605358

CITY OF CHICAGO

vs.

JACK MAYER, DEFENDANT

Order of 2-3-70
Date

Post trial motion for judgment n.o.v., and for a new trial, and for reducing fines, is hereby denied. Existing bond is to stand as the appeal bond.

/s/ John A. Ouska
Judge

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS,
MUNICIPAL DIVISION

Nos. 605358, 605359

[Filed, Municipal Court of Chicago, First Municipal District of Circuit Court, Cook County, Feb. 18, 1970, Matthew J. Danaher, Clerk of Court]

THE CITY OF CHICAGO, PLAINTIFF,

v.

JACK L. MAYER, DEFENDANT

MOTION FOR LEAVE TO PROCEED AS A POOR PERSON

Defendant Jack Mayer moves this court for leave to proceed as a poor person under Illinois Supreme Court Rules 298 and 607 and for the appointment of counsel.

Defendant states that the facts contained in the attached affidavit are true to the best of his knowledge and belief and requests that his attorney, Henry Field, be appointed because of his familiarity with the proceedings.

By /s/ Jack L. Mayer
JACK L. MAYER

SUBSCRIBED AND SWORN TO
before me this 3rd day
of February, 1970.
At New York, N.Y.

/s/ Roger F. Rose
Notary Public

ROGER F. ROSE
Notary Public, State of New York
No. 31-8642010
Qualified in New York County
Commission Expires March 30, 1970

Denied
2-24-70

/s/ Judge Horan

1) I, the undersigned, am a medical student at the New York University School of Medicine, and I have no other means of subsistence other than my parents who pay for my tuition and a New York State Regents Incentive Scholarship.

2) In the year preceding this application my income was $0.00.

3) I have no source of income expected in the near future.

4) I have no real or personal property.

5) No other application for leave to proceed as a poor person has been filed by me during the year.

6) I am unable to pay the costs of the suit and to do so would cause great hardship to myself and my parents.

7) I have a good claim for defense.

By /s/ Jack L. Mayer
JACK L. MAYER

[Filed, Municipal Court of Chicago, First Municipal District of Circuit Court, Cook County, Feb. 18, 1970, Matthew J. Danaher, Clerk of Court]

Subscribed and Sworn to
before me this 3rd day
of February, 1970.
At New York, N.Y.

/s/ Roger F. Rose
Notary Public

ROGER F. ROSE
Notary Public, State of New York
No. 31-8642010
Qualified in New York County
Commission Expires March 30, 1970

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS,
MUNICIPAL DIVISION

Nos. 605358, 605359

[Filed, Municipal Court of Chicago, First Municipal District of Circuit Court, Cook County, Feb. 18, 1970, Matthew J. Danaher, Clerk of Court]

THE CITY OF CHICAGO, PLAINTIFF,

v.

JACK L. MAYER, DEFENDANT

ORDER

It is ordered that defendant Jack Mayer be allowed to proceed as a poor person without payment of costs.

It is further ordered that the court reporter prepare such portion of the trial transcript as the parties may designate without cost to the defendant.

It is further ordered that Henry Field be appointed to represent the defendant in this proceeding.

Entered this —— day of ————————, 1970.

_____
Judge

Dated:

Sheet No. _____

Line No. _____

No. 69 MC 605359

CITY OF CHICAGO

vs.

JACK MAYER, DEFENDANT

Order of Feb. 24, 1970
Date

Ordered that the motion of the defendant for leave to proceed as a poor person be and it is hereby denied on the grounds that defendant was found guilty of ordinance violations and that rule 607 of the Supreme Court applies to felony cases.

/s/ Charles P. Horan
Judge

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS,
MUNICIPAL DIVISION

Nos. 605358, 605359

[Filed, Municipal Court of Chicago, First Municipal District of Circuit Court, Cook County, Feb. 26, 1970, Matthew J. Danaher, Clerk of Court]

THE CITY OF CHICAGO, PLAINTIFF,

v.

JACK L. MAYER, DEFENDANT

NOTICE OF APPEAL

An appeal is taken from the order of judgment described below:

1. Court to which appeal is taken: Supreme Court of Illinois.

2. Name of appellant and address to which notices shall be sent: Jack L. Mayer, c/o Henry F. Field, 231 South La Salle Street, Chicago, Illinois 60604.

3. Name and address of appellant's attorney on appeal: Henry F. Field, 231 South La Salle Street, Chicago, Illinois 60604.

If appellant is indigent and has no attorney, does he want one appointed? Appellant asks appointment of Mr. Henry F. Field.

4. Date of judgment or order: February 3, 1970.

5. Offense of which convicted: interference with police officer, disorderly conduct.

6. Sentence: $500 fine.

7. If appeal is not from a conviction, nature of order appealed from: post-trial motion, conviction.

/s/ Henry Field
HENRY F. FIELD
Attorney for Defendant

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS,
MUNICIPAL DIVISION

Nos. 605358, 605359

JACK L. MAYER, DEFENDANT-APPELLANT

v.

THE CITY OF CHICAGO, PLAINTIFF-APPELLEE

MOTION FOR COMPLETION OF THE RECORD ON APPEAL UNDER RULE 329

1. On January 14, 1970, Defendant-Appellant was convicted by jury in the Municipal Court of Cook County, J. Ouska presiding, of disorderly conduct and interfering with a police officer.

2. On January 28, 1970, Defendant-Appellant's counsel, Henry Field, was informed by the court reporter's office that the cost of the trial transcript covering only the testimony would be approximately $300.

3. On February 3, 1970, Defendant-Appellant moved in the Circuit Court for leave to proceed as a poor person, for appointment of counsel, and for a transcript for appeal. After a hearing before Acting Chief Judge Horan in Room 1301, Civic Center, this motion was denied. The court indicated that a finding of indigency was proper, based upon the affidavit, but ruled that he lacked power to order the relief sought because Supreme Court Rule 607(a) applies only to "felonies" and Defendant-Appellant's case was not a "felony." On this basis the following order of court was entered on the "half sheet":

> "That motion of defendant to proceed as a poor person is hereby denied."

5. Notice of appeal was filed on February 25, 1970.

6. On March 24, 1970, Defendant-Appellant's motion

for leave to proceed as a poor person, for the appointment of counsel and for a transcript was heard by Associate Judge Ward of the Illinois Supreme Court, who referred the matter to the entire Court. Defendant-Appellant filed a written brief with the Court, arguing the unconstitutionality of Rule 607 as written and containing the statement, *inter alia*, that:

> "Following conviction, appellant petitioned the Circuit Court through Acting Chief Judge Horan, for a transcript, for the appointment of counsel, and for waiver of fees. This petition was denied, upon the sole ground that the Supreme Court Rules do not allow an indigent to obtain a transcript unless his conviction is for a felony. (See especially Rule 607 (a).)"

7. On September 18, 1970, the Illinois Supreme Court made an announcement that in this case:

> "The portion of the motion by appellant that he be furnished a transcript of proceedings without cost and for appointment of counsel was denied. The part of the motion for waiver of filing fees was allowed."

8. Defendant-Appellant now moves this court for the entry of an order, attached herewith, completing and clarifying the record in this case insofar as his status as a poor person is concerned.

Whereas, Defendant-Appellant Jack L. Mayer moves this court for a finding of indigency in order to complete the record for appeal.

This motion is filed under Supreme Court Rule 329.

/s/ Henry F. Field

HENRY F. FIELD
231 South La Salle Street
Chicago, Illinois 60604
STate 2-0600
Attorney for Defendant-Appellant

AFFIDAVIT

I hereby affirm that the statements in the herein-presented motions are true to the best of my knowledge and belief.

/s/ Henry F. Field
HENRY F. FIELD

SUBSCRIBED AND SWORN TO
before me this 25th day
of September, 1970.

/s/ Bertha M. Veramonte
Notary Public

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS,
MUNICIPAL DIVISION

Nos. 605358, 605359

JACK L. MAYER, DEFENDANT-APPELLANT

v.

THE CITY OF CHICAGO, PLAINTIFF-APPELLEE

NOTICE OF MOTION

To: Corporation Counsel
605 City Hall
Chicago, Illinois 60602

Attention: Mr. Larry Chambers

Defendant-Appellant, by his counsel, will present the attached motion before the Chief Judge of the Circuit Court, or such Judge as shall be hearing motions in his stead, at 10:00 A.M. on Thursday, October 1, 1970 in the Civic Center.

/s/ Henry F. Field
HENRY F. FIELD
231 South La Salle Street
Chicago, Illinois 60604
STate 2-0600
Attorney for Defendant-
Appellant

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS,
MUNICIPAL DIVISION

Nos. 605358, 605359

JACK L. MAYER, DEFENDANT-APPELLANT

v.

THE CITY OF CHICAGO, PLAINTIFF-APPELLEE

AFFIDAVIT OF SERVICE

I served a copy of the attached motion, order and notice upon the Corporation Counsel, Attention Larry Chambers, by prepaid mail on Friday, September 25, 1970 at 5:00 P.M.

/s/ Henry F. Field
HENRY F. FIELD

SUBSCRIBED AND SWORN TO
before me this 25th day
of September, 1970.

/s/ Eleanor A. Alekna
Notary Public

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS,
MUNICIPAL DIVISION

Nos. 605358, 605359

[Filed, Municipal Court of Chicago, First Municipal District of Circuit Court, Cook County, Oct. 2, 1970
Matthew J. Danaher, Clerk of Court]

JACK L. MAYER, DEFENDANT-APPELLANT

v.

THE CITY OF CHICAGO, PLAINTIFF-APPELLEE

ORDER

This matter coming on upon the motion of appellant for a free transcript, and the appointment of counsel for appeal, and

being advised in the premises by argument of counsel for both sides, of the existence and constitutionality of Illinois Supreme Court Rule 607, providing free transcripts, the appointment of counsel and the waiver of filing fees for appeals by indigents from felony convictions,

this court finds:

(a) appellant Jack L. Mayer is an indigent for the purposes of appeal,

(b) because said Rule does not apply to misdemeanor or "quasi-criminal" convictions such as appellant appeals from here,

appellant's motion is denied.

_____
Judge, Circuit Court

Dated:

SHEET NO. _____

LINE NO. _____

No. 69 MC 605359
69 MC 605358

CITY OF CHICAGO

v.

JACK MAYER, DEFENDANT

ORDER OF Oct. 2nd 1970
Date

Court finds that the defendant is an indigent person on the basis of his affidavit and hearing.

nunc pro tunc

/s/ Charles P. Horan
Judge

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS,
MUNICIPAL DIVISION

Nos. 69 MC 605358
69 MC 605359

[Filed Oct. 20, 1970]

JACK L. MAYER, APPELLANT

v.

THE CITY OF CHICAGO, APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Appellant Jack L. Mayer hereby appeals to the Supreme Court of the United

States from the final judgment order of the Illinois Supreme Court entered September 18, 1970 denying Appellant a transcript of the trial proceedings against him.

This appeal is taken pursuant to 28 U.S.C. § 1257(2). The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaints against Appellant Jack L. Mayer,
2. Judgment order entered January 14, 1970.
3. Post-trial Motion by Jack L. Mayer.
4. Motion for leave to proceed as a poor person filed in the Circuit Court of Cook County on February 3, 1970.
5. Circuit Court Judge Charles Horan's order entered upon the motion filed February 3, 1970, and half-sheet entry of the same date.
6. Notice of Appeal filed in the Circuit Court of Cook County on February 25, 1970. Also this Notice of Appeal.
7. Motion for leave to appeal as a poor person filed in the Supreme Court of Illinois on March 24, 1970.
8. Order of the Supreme Court of Illinois denying Appellant's Motion for leave to appeal as a poor person entered September 18, 1970.
9. Order of Circuit Court Judge Charles Horan entered upon Appellant's Motion to Complete the Record, October 2, 1970.

Items 1-6 and Item 9 are physically in the custody of the Circuit Court of Cook County, Mrs. Edna Witkowski, Room 602, Civic Center, preparatory to transmission to the Clerk of the Illinois Supreme Court. Items 7 and 8 are with the Clerk of the Illinois Supreme Court. Because this record is in the possession of both the Clerk of the Circuit Court and the Clerk of the Supreme Court, this Notice of Appeal is being filed in both courts. Please prepare, certify and transmit the portions of the record designated which are within your power to transmit.

The following question is presented by this Appeal:

Does Rule 607(b) of the Supreme Court of Illinois, prohibiting the provision of trial transcripts at State expense to indigents seeking review of convictions for offenses other than felonies, create an invidious classification among citizens on the basis of wealth in violation of the Fourteenth Amendment to the United States Constitution?

/s/ Henry F. Field
HENRY F. FIELD
Attorney for Appellant

OF COUNSEL:

Mayer, Brown & Platt
231 South La Salle Street
Chicago, Illinois 60604
STate 2-0600

PROOF OF SERVICE

This is to certify that I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the City of Chicago, by mailing same to Mr. Edmund Hatfield, Corporation Counsel, 511 City Hall, Chicago, Illinois 60602, on October 20, 1970.

/s/ Henry F. Field

SUBSCRIBED AND SWORN TO
before me this 20th day
of October, 1970.

/s/ Eleanor A. Alekna
Notary Public

CERTIFICATE OF COPY

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

I, MATTHEW J. DANAHER, Clerk of the Circuit Court of Cook County, Illinois and the keeper of the records and files thereof, do hereby certify the above and foregoing to be a true, perfect and complete copy of certain proceedings made and entered of record in said Court; also of a certain COMPLAINT attached to File No. 69 MC1 605358; also of a certain JUDGE'S MEMORANDUM dated FEBRUARY 3, 1970; also of a certain MOTION FOR LEAVE TO PROCEED AS A POOR PERSON filed on FEBRUARY 18, 1970; also of a certain JUDGE'S MEMORANDUM dated FEBRUARY 24, 1970; also of a certain NOTICE OF APPEAL filed on FEBRUARY 26, 1970; also of a certain ORDER filed on OCTOBER 2, 1970; also of a certain JUDGE'S MEMORANDUM dated OCTOBER 2, 1970; also of a certain NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES AND PROOF OF SERVICE filed on the 20th day of OCTOBER, A.D. 1970; the originals of which are on file in my office, in a certain cause lately pending in said Court, on the law side thereof, between CITY OF CHICAGO, a Municipal Corporation, Plaintiff, and JACK L. MAYER, Defendant, IN WITNESS WHEREOF. I have hereunto set my hand and affixed the Seal of said Court, at Chicago, aforesaid APRIL 30, 1971.

/s/ Matthew J. Danaher
Clerk

[SEAL]

CERTIFICATE OF COPY

STATE OF ILLINOIS)
) ss.
County of Cook)

I, MATTHEW J. DANAHER, Clerk of the Circuit Court of Cook County, Illinois and the keeper of the records and files thereof, do hereby certify the above and foregoing to be a true, perfect and complete copy of certain proceedings made and entered of record in said Court, also of a certain Complaint attached to file No. 69 MC1 605359; the original of which is in my possession, also of a certain Order and Post-Trial Motion filed on the 30th day of JANUARY, A.D. 1970; the originals of which are on file in my office, in a certain cause lately pending in said Court, on the law side thereof, between THE CITY OF CHICAGO, a municipal corporation, plaintiff, and JACK L. MAYER, defendant.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court, at Chicago, aforesaid, APRIL 30, 1971.

/s/ Matthew J. Danaher
Clerk

[SEAL]

THE UNITED STATES OF AMERICA

IN THE CITY OF CHICAGO
COUNTY OF COOK, STATE OF ILLINOIS

STATE OF ILLINOIS)
) SS.
County of Cook)

I, EUGENE L. WACHOWSKI Presiding Judge of The Circuit Court of Cook County, Illinois, do hereby certify that MATTHEW J. DANAHER, whose name is subscribed to the foregoing Certificate of Attestation, now is, and was, at the time of signing and sealing the same, the CLERK of The Circuit Court of Cook County, Illinois, and keeper of the Seal and the records thereof, duly elected, commissioned and qualified; that full faith and credit, are, and of right ought to be given to all his official acts as such, in all Courts of Record in the United States and elsewhere, and that the attestation is in due form of law and by the proper officer.

Given under my hand at my Chambers in Chicago, Illinois, this 30th day of April, A.D., 1971.

/s/ Eugene L. Wachowski, (SEAL)
Presiding Judge of The Circuit
Court of Cook County,
Illinois

THE UNITED STATES OF AMERICA

STATE OF ILLINOIS)
) ss.
County of Cook)

I, MATTHEW J. DANAHER, Clerk of The Circuit Court of Cook County, Illinois, do hereby certify that HONORABLE EUGENE L. WACHOWSKI, whose name is subscribed to the foregoing Certificate of Attestation, now is, and was, at the time of the signing thereof, Presiding Judge of The Circuit Court of Cook County, Illinois, duly elected, commissioned and qualified, and that his said signature is genuine.

In Witness Whereof, I have signed my name and affixed the Seal of The Circuit Court of Cook County, Illinois, April 30, 1971.

/s/ Matthew J. Danaher
Clerk of The Circuit Court
of Cook County, Illinois

(SEAL)

THE UNITED STATES OF AMERICA

IN THE CITY OF CHICAGO
COUNTY OF COOK, STATE OF ILLINOIS

STATE OF ILLINOIS)
) SS.
County of Cook)

I, HON. EUGENE L. WACHOWSKI, Presiding Judge of The Circuit Court of Cook County, Illinois, do hereby certify that MATTHEW J. DANAHER, whose name is subscribed to the foregoing Certificate of Attestation, now is, and was, at the time of signing and sealing the same, the CLERK of The Circuit Court of Cook County, Illinois, and keeper of the Seal and the records thereof, duly elected, commissioned and qualified; that full faith and credit, are, and of right ought to be given to all his official acts as such, in all Courts of Record in the United States and elsewhere, and that the attestation is in due form of law and by the proper officer.

Given under my hand at my Chambers in Chicago, Illinois, April 30, 1971.

/s/ Eugene L. Wachowski, (SEAL)
Presiding Judge of The Circuit
Court of Cook County,
Illinois

THE UNITED STATES OF AMERICA

STATE OF ILLINOIS)
) ss.
County of Cook)

I, MATTHEW J. DANAHER, Clerk of The Circuit Court of Cook County, Illinois, do hereby certify that HONORABLE EUGENE L. WACHOWSKI, whose name is subscribed to the foregoing Certificate of Attestation, now is, and was, at the time of the signing thereof, Presiding Judge of The Circuit Court of Cook County, Illinois, duly elected, commissioned and qualified, and that his said signature is genuine.

In Witness Whereof, I have signed my name and affixed the Seal of The Circuit Court of Cook County, Illinois, April 21, 1971.

/s/ Matthew J. Danaher
Clerk of The Circuit Court
of Cook County, Illinois

(SEAL)

UNITED STATES OF AMERICA

State of Illinois)
) ss.
Supreme Court)

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the fourteenth day of September in the year of our Lord, one thousand nine hundred and seventy, within and for the State of Illinois.

Present: ROBERT C. UNDERWOOD, *Chief Justice;* JUSTICE WALTER V. SCHAEFER, JUSTICE THOMAS E. KLUCZYNSKI, JUSTICE DANIEL P. WARD, JUSTICE JOHN T. CULBERTSON, JR., JUSTICE CASWELL J. CREBS, JUSTICE MARVIN F. BURT

WILLIAM J. SCOTT, *Attorney General*
ROBERT G. MIDEY, *Marshal*
Attest: JUSTIN TAFT, *Clerk*

BE IT REMEMBERED, that, to-wit: on the 18th day of September, A.D. 1970, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

No. 43044

JACK L. MAYER, APPELLANT

vs.

THE CITY OF CHICAGO, APPELLEE

APPEAL FROM CIRCUIT COURT, COOK COUNTY

And now, on this day, the Court having duly considered the motion by appellant that he be furnished a transcript of proceedings without cost, for waiver of filing fees, and for appointment of counsel, and being fully advised of and concerning the premises;

IT IS HEREBY ORDERED that the portion of the motion by appellant that he be furnished a transcript of proceedings without cost and for appointment of counsel be, and the same is, denied and the part of the motion for waiver of filing fees be, and the same is, allowed.

SUPREME COURT OF THE UNITED STATES

No. 6061, OCTOBER TERM, 1970

JACK L. MAYER, APPELLANT

v.

CITY OF CHICAGO

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

February 22, 1971

SUPREME COURT OF THE UNITED STATES

No. 6061, OCTOBER TERM, 1970

JACK L. MAYER, APPELLANT

v.

CITY OF CHICAGO

APPEAL from the Supreme Court of the State of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

February 22, 1971

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-

JACK L. MAYER,

Appellant,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Appellee.

ON APPEAL FROM THE ILLINOIS SUPREME COURT

MOTION TO DISMISS OR AFFIRM

RICHARD L. CURRY,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago, Illinois 60602,
Attorney for Appellee

MARVIN E. ASPEN,
RICHARD HAWKINS,
Assistant Corporation Counsel,
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 6061

JACK L. MAYER,

Appellant,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Appellee.

ON APPEAL FROM THE ILLINOIS SUPREME COURT.

MOTION TO DISMISS OR AFFIRM.

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Illinois Supreme Court on the grounds (1) that, as a matter of law, the Appellant has failed to show that he has a right to the relief sought, and (2) that this appeal presents no question not already decided by this Court.

THE NATURE OF THE CASE.

As the Appellant's jurisdictional Statement indicates, this is an appeal from an order entered by the Illinois Supreme Court denying Appellant's motion that he be furnished a *free complete verbatim transcript* of the two day jury trial at which he was convicted of two municipal

ordinance violations: to-wit, disorderly conduct and interfering with a police officer in the performance of his duties. These convictions arose out of an incident that occurred during an anti-Vietnam war demonstration which resulted in violence.

Appellant claims (Jurisdictional Statement, p. 6) that in his post-trial motion he urged that the proof was insufficient to sustain the verdict and that the prosecutor indulged in prejudicial misconduct. But the record filed does not reveal whether or not these points were specified in Appellant's post-trial motion.

In any event, after denial of his post-trial motion, Appellant moved for leave to proceed as a poor person and this was denied by the trial court (Appendix D). The order entered February 24, 1970, indicates that Appellant asked that he be supplied with a free transcript on appeal, pursuant to Illinois Supreme Court Rule 607, which was denied on the ground that the rule "applies to felony cases."

On March 24, 1970, Appellant renewed his application for a free transcript before a justice of the Illinois Supreme Court sitting between terms, who referred the matter to the full court. On September 18, 1970, the Illinois Supreme Court entered a memorandum order granting Appellant leave to proceed as a poor person, but denying him a free complete verbatim transcript.

ARGUMENT.

I.

THE APPELLANT HAS FAILED TO SHOW THAT HE IS ENTITLED TO THE RELIEF SOUGHT.

Appellant invokes *Griffin* v. *Illinois,* 351 U. S. 12 (1956), and its extension by *Williams* v. *Oklahoma City,* 395 U. S. 458 (1969), to indigents convicted of municipal ordinance violations. It is the position of the Appellee that Appellant has failed to make a showing sufficient to bring himself within the ambit of these decisions.

The majority opinion in *Griffin* states (at 20):

> "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court [of Illinois] may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in cases. [Citing cases.] The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice. [Citations.] We are confident that the State will provide corrective rules to meet the problem which this case lays bare."

The concurring opinion of Mr. Justice Frankfurter in *Griffin* further observed (at 24):

> "But in order to avoid or minimize abuse and waste, a State may appropriately hedge about the opportunity to prove a conviction wrong. When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing re-

view still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process."

These considerations were amplified and particularized by this Court in *Draper* v. *Washington*, 372 U. S. 487 (1963). We take the liberty of quoting this discussion (at 495, 496), crucial to the instant case, at some length:

"... [W]e reaffirm the principle, declared by the Court in *Griffin*, that a State need not purchase a stenographer's transcript in every case where a defendant cannot buy it. 351 U. S. at 20. Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript. Moreover, part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances. . . . If the assignments of error go only to rulings on evidence or to its sufficiency, the transcript provided might well be limited to the portions relevant to such issues. Even as to this kind of issue, however, it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted. In the examples given, the fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review. In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with

> funds—the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions."

The Appellant's reliance on *Hardy* v. *United States,* 375 U. S. 277 at 288, 289 (1963), in support of the proposition that an indigent is entitled to a complete transcript without proof that he needs it is misplaced. The majority opinion of this Court in *Hardy* is limited to cases in which the indigent is represented on appeal by a lawyer other than his attorney at the trial. In the instant case, Appellant's present counsel also represented him at the trial (Appellant's Brief in Illinois Supreme Court, p. 1). Therefore *Hardy* is inapplicable. Furthermore, *Hardy* was a federal criminal case and was decided not on a constitutional issue, but under this Court's more plenary power to promulgate rules of procedure for the federal courts.

The instant Appellant has failed to show why, if he is to present his appeal in the Illinois Supreme Court adequately, it is necessary (1) that he have a verbatim transcript, and (2) that he have a complete verbatim transcript.

As is indicated by the opinion of this Court in *Griffin* v. *Illinois,* 351 U. S. 12 at 20 (1956), the Illinois Supreme Court has broad powers to provide means of affording adequate and effective appellate review to indigent defendants other than a verbatim transcript. The Illinois Supreme Court has done so. Rule 323(c) of the Rules of the Illinois Supreme Court, as revised October, 1969, provides:

> ". . . [T]he appellant may prepare a proposed report of proceedings from the best available sources, including recollection. It shall be served within 7 days after the notice of appeal is filed. Within 21 days after the notice of appeal is filed, any other party may serve proposed amendments or his proposed report of proceedings. Within 7 days thereafter, the appellant shall,

> upon notice, present the proposed report or reports and any proposed amendments to the trial court for settlement and approval. The court, holding hearings if necessary, shall promptly settle, certify, and order filed an accurate report of proceedings."

The Appellant has made no attempt to proceed in this alternative fashion. He has not come forth with any proposed report of proceedings of his own, prepared, as the rule requires, while the proceedings are still fresh in memory. There is nothing in the record intimating that Appellant has sought to draft, as suggested by this Court's opinion in *Draper* v. *Washington,* 372 U. S. 487, at 495 (1963), "a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes."

Another alternative is afforded by Illinois Supreme Court Rule 323(d), which permits the parties by written stipulation to "agree upon a statement of facts material to the controversy and file it in lieu of and within the time for filing a report of proceedings." Since one of Appellant's contentions on appeal is that the prosecutor was guilty of prejudicial misconduct, such agreement might in the instant case be difficult or impossible. Yet, it is by no means inconceivable that the prosecutor might consider his conduct in no wise prejudicial and be willing to stipulate to having said and done what he said and did. Appellant has made no attempt to work out an agreed statement of facts.

Another point on appeal that Appellant is attempting to urge is his defense of "necessity." He claims that his admitted interference with the action of the police, during a riot, while they were removing an injured person from a city street, was necessary, because, he, a medical student possessing some medical knowledge, could surmise that doing so might result in more serious damage to the injured one. Surely a 300 page transcript is not required to present

the point that the trial court erred in declining to give an instruction setting forth Appellant's theory.

Appellant's other point on appeal is that his two convictions were contrary to the manifest weight of the evidence. But this Court specifically stated in *Draper* v. *Washington*, 372 U. S. 487, at 496 (1963), that if the assignments of error go to the rulings on evidence or to its sufficiency, the transcript provided can be limited to the portions relevant to such issues and that "it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted."

Appellant also presents an erroneous rendering of the Illinois Supreme Court Rule he urges is "unconstitutional." He claims (Jurisdictional Statement, p. 4) that Rule 607(b) prohibits the provision of trial transcripts at state expense to indigents seeking review of convictions for offenses other than felonies. The literal reading of that rule is that it authorizes indigents convicted of felonies to petition the trial court for a report of proceedings. The exact language of the rule is:

> "In any case in which the defendant is convicted of a felony, he may petition the court in which he was convicted for a report of proceedings at his trial."

That the rule does not also mention misdemeanors and quasi-criminal matters does not make it unconstitutional.

Milani v. *Illinois*, 386 U. S. 12 (1967), reversing 34 Ill. 2d 524, cited by Appellant (Jurisdictional Statement, p. 21), is a mere memorandum order. The state court decision there reversed—*People* v. *Milani*, 34 Ill. 524 (1966)—simply held (at 527) that defendant's contention that the transcript was "incomplete and inaccurate" was "of no consequence on appeal" because of his substituted plea of guilty. On appeal

defendant claimed his plea of guilty was coerced. There is no basis for Appellant's view that this Court disregarded the criterion of "need" for the transcript.

Roberts v. *LaVallee,* 389 U. S. 40 (1967), cited by Appellant (Jurisdictional Statement, pp. 20, 21), turned on that petitioner's right to relief in federal habeas corpus proceedings without being required to resort to further state court proceedings. It was the dissenting opinion of one justice that expressed the view that the petitioner therein had not suggested the need for a transcript of the preliminary hearing. The majority opinion did not deal with the need to demonstrate need.

To sum up, Appellant has not complied with the actual tenor of *Griffin* v. *Illinois* and *Williams* v. *Oklahoma City.* He demanded more than he was entitled to under those decisions. By asking too much and doing too little to help himself, Appellant deprived the Illinois Supreme Court of a fair opportunity to vindicate his constitutional rights.

II.

THIS APPEAL PRESENTS NO QUESTION NOT ALREADY DECIDED BY THIS COURT.

The points raised by Appellant have already been fully disposed of by this Court in *Griffin* v. *Illinois,* 351 U. S. 12 (1956), and *Williams* v. *Oklahoma City,* 395 U. S. 458 (1969).

CONCLUSION.

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the order of the Illinois Supreme Court denying Appellant's motion to be furnished without cost, a complete verbatim transcript of the proceedings in the trial court.

Respectfully submitted,

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January 18, 1971.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-5040

No. ~~6061~~

JACK L. MAYER,

Appellant,

v.

THE CITY OF CHICAGO,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF FOR APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 6061

JACK L. MAYER,

Appellant,

v.

THE CITY OF CHICAGO,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF FOR APPELLANT

Appellant prays that, as a poor person, he be provided the report of proceedings at his trial so that he can present certain alleged errors on appeal to the Supreme Court of Illinois.

OPINION BELOW

The opinion of the Supreme Court of Illinois denying that portion of Appellant's motion which requested a report

of proceedings as a poor person (hereinafter "free transcript") is unreported and is set forth in the Appendix. (A. 46)*

JURISDICTION

The order of the Supreme Court of Illinois denying Appellant's motion for a free transcript was entered September 18, 1970 and was final then. Notice of appeal to this Court was filed in the Circuit and Supreme Courts of Illinois on October 20, 1970. Probable Jurisdiction was noted on February 22, 1971. Jurisdiction is conferred by the U.S. Constitution, Amendment 14, and 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 14 to the United States Constitution provides that:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 607(b) of the Supreme Court of Illinois (110A Ill. Rev. Stat. § 607(b)(1970)) provides as follows:

> "Report of Proceedings. In any case in which the defendant is convicted of a *felony*, he may petition the court in which he was convicted for a report of proceedings at his trial. If the conduct on which the felony case is based was also the basis for a juvenile proceeding which was dismissed so the felony case could proceed, the defendant may include in his petition a request for a report of proceedings in the juvenile proceeding. The petition shall be verified by the petitioner and shall state facts showing that he was at the time of his convic-

*Citations to the Appendix are hereinafter designated (A. __).

> tion, and is at the time of filing the petition, without financial means to pay for the report. If the judge who imposed sentence, or in his absence any other judge of the court, finds that the defendant is without financial means with which to obtain the report of proceedings at his trial, he shall order the court reporter to transcribe an original and copy of his notes. The original of the report shall be certified by the reporter and filed with the clerk of the trial court as provided below, and the copy shall be certified by the reporter and delivered to the defendant without charge. The reporter who prepared a report of proceedings pursuant to an order under this rule shall be paid the same fee for preparing the transcript as is provided by law for the compensation of reporters for preparing transcripts in other cases." (Emphasis supplied.)

The ordinances of the City of Chicago, Illinois, defining the crimes with which Appellant was charged, the statutes and Constitutional provisions of the State of Illinois providing Appellant with an appeal of right, and the sundry Illinois Constitutional provisions, statutes, rules and orders relating to the provision of transcripts involved are too numerous to cite here, and are set forth *infra*, at pp. 1a-7a.

QUESTION PRESENTED

May a State, which furnishes court reporters at trial and grants appeals of right to defendants convicted of *non-felony* offenses, constitutionally refuse to provide a free trial transcript to an indigent defendant convicted of a *non-felony* offense who needs the transcript to have a minimally adequate appeal?

STATEMENT OF THE CASE

After a two-day jury trial in the Circuit Court of Cook County, Illinois (A. 3-6), Appellant (hereinafter "defendant") was found guilty of "disorderly conduct" and "interfering with a peace officer" in the performance of his lawful duties, in violation of two ordinances of the City of Chicago (Municipal Code of Chicago, Ch. 193, § 1(a) and Ch. 11, § 11-33, respectively) (*infra* at 1a). Under these charges, defendant faced a possible penalty of a $1,000 fine: $500 on each charge. He was actually fined $500: $250 on each charge (A. 4, 6). Illinois provides for imprisonment for nonpayment at the rate of $5 per day, 24 Ill. Rev. Stat. § 1-2-9. But *cf. Tate v. Short*, ___ U.S. ___, 91 S. Ct. 668 (1971).

After his convictions, defendant filed a post-trial motion seeking a new trial and alleging numerous errors at trial, including the contentions that the proof was insufficient to sustain the verdict, and that certain deliberate misconduct by the prosecutor was egregiously prejudicial and unconscionable (A. 11-23). This motion was denied (A. 25).

Thereupon, defendant moved in the Circuit Court of Cook County for leave to proceed as a poor person, for the production of his transcript at public expense, for the appointment of counsel for the purposes of appeal, and for the waiver of filing fees. After a hearing, the Acting Chief Judge of the Circuit Court of Cook County found the defendant to be indigent and unable to afford the transcript but denied defendant a free transcript on the sole ground that "defendant was found guilty of ordinance violations and that rule 607 of the Supreme Court applies [only] to felony cases" (A. 29). Although Illinois by Supreme Court Rule provides free transcripts on appeal to indigent persons convicted of a felony, *supra* at 2-3 , it nowhere provides free transcripts for indigent nonfelony appellants.

Notice of Appeal to the Illinois Supreme Court was then filed in the Circuit Court on the basis of constitutional

errors at trial. Illinois Constitution of 1870, Art. VI § 5 (A. 30). Defendant renewed his motion for leave to appeal as a poor person, for the production of his transcript, for the appointment of counsel, and for the waiver of filing fees before the full Illinois Supreme Court. Defendant argued in support of his motion that, under the rule of *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Williams v. Oklahoma City*, 395 U.S. 458 (1969), the Fourteenth Amendment requires a State to afford indigent nonfelony appellants a free transcript wherever necessary to adequately present their appeals, and that therefore Rule 607 is unconstitutionally restrictive (R. 1-14).*

Defendant pointed out that two of his grounds for appeal require that he be furnished a transcript, namely (1) the inadequacy of the evidence to support the verdicts, and (2) the sustained, deliberate and prejudicial misconduct by the prosecutor. As to both contentions, the full facts are necessary, not subject to adequate recall, and available only if a transcript is furnished.

After six months' consideration of the motion, the Illinois Supreme Court denied defendant's request for a free transcript and for the appointment of counsel, while granting the waiver of filing fees (A. 46).**

SUMMARY OF ARGUMENT

The Fourteenth Amendment to the U.S. Constitution forbids a State from making "invidious discriminations" among its citizens, and in *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court held that the failure of a State to

*Citations to the Record are to the certified Record from the Illinois Supreme Court and are hereinafter designated (R. __).

**The times for filing the record in the Illinois Supreme Court have been continued until final resolution of the transcript issue by this Court. Counsel for defendant is the same on appeal as at trial, and is willing to serve without compensation, so the motion for appointment in Illinois is not raised here.

provide an indigent appellant with a trial transcript, while making transcripts available to appellants with enough money to pay for them, is such an "invidious discrimination." *Griffin* was a felony case, and thereafter the Illinois Supreme Court promulgated its Rule 607(b), which limits free transcripts to indigent felony appellants only. In *Williams v. Oklahoma City*, 395 U.S. 458 (1969), however, this Court applied the *Griffin* rule to a "quasi-criminal" traffic ordinance violation, over the objection of Oklahoma City and the Supreme Court of Oklahoma that *Griffin* did not apply to such a case. Defendant's case here is identical in all important respects with that in *Williams*—he is indigent, a transcript of the trial exists, it is the only way to present an adequate appeal, and Illinois denies it to him solely because he is poor. But now Illinois also denies it to him in the face of *Williams v. Oklahoma City*.

For Illinois to deny defendant a free transcript solely because his convictions were not for felonies is to deny him Equal Protection of the law. Any nonfelony appellant convicted of a penal offense with enough money to pay the price gets an adequate appeal, but those without such means do not. No state can constitutionally provide for appeals from all criminal convictions as a matter of right, permit wealthy defendants who can afford a transcript to fully enjoy that right, and at the same time deny a transcript and thereby a full appeal to poor defendants.

Illinois has also deprived defendant of Due Process of Law, for without access to the transcript he is wholly foreclosed from effectively presenting at least two substantial contentions to the Supreme Court of Illinois: (1) the shockingly deliberate and prejudicial misconduct of the prosecution, and (2) the insufficiency of the evidence to sustain the convictions. It is clear from the face of these contentions that if defendant is to have an effective appeal, he must have access to the transcript. How can an appellate process be "due" or fundamentally fair which denies only the indigent the rudimentary predicate for presenting

the factual basis of his contentions on appeal—the official transcript in the court reporter's possession?

It is wholly unjustifiable to argue that indigent nonfelony appellants should be denied their Constitutional rights to a free transcript because of the speculation that the cost of providing transcripts to indigents will somehow enormously "burden" the State. Statistical analysis reveals this fear to be totally illusory; the number of nonfelony criminal appeals is quite small (dwindling as the penalty gets smaller), the number involving indigents and also requiring transcripts even smaller, and the "demand" for (or number of) nonfelony appeals is, as will be shown, almost totally inelastic with respect to the provision of free transcripts to indigents. Moreover, most nonfelony trials are very short and hence the transcripts would cost relatively little. And the supposed "burden" of providing indigents with free transcripts for all penal offenses, whether ordinance or statutory in origin, is one which at least several of our most populous States have already decided to assume.

The Constitutional protections insured by the availability of a transcript should be available to all persons convicted of an offense, regardless of the severity of the punishment, and regardless of whether they receive a suspended sentence, probation, a term in jail or fine. To one too poor to pay for a $300 transcript, a $1,000 fine is as severe a penalty as a term in jail. Certainly it is far more onerous than a suspended sentence or probation. Moreover, the risk of collateral civil disabilities is substantial, and the stigma of an offense follows the offender regardless of the sentence received. Because of these facts, no one unjustly penalized by the criminal law should be denied a transcript, and hence substantial justice, because of his poverty.

ARGUMENT

I. SIMPLY BECAUSE AN INDIGENT APPELLANT WAS CONVICTED OF NONFELONY OFFENSES, A STATE MAY NOT CONSTITUTIONALLY DENY HIM A FREE TRIAL TRANSCRIPT WHERE SUCH TRANSCRIPT IS NECESSARY TO EFFECTIVELY PRESENT HIS CONTENTIONS ON APPEAL.

A. The Constitutional Standard: a convicted indigent must be afforded *as adequate an appeal* as a person with funds.

The Fourteenth Amendment to the United States Constitution forbids a State to "deny to any person within its jurisdiction the equal protection of the laws" or to "deprive any person of life, liberty, or property without due process of law." (*Supra* at 2.) Fifteen years ago, in *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court fleshed out those words by holding that a State with an appellate system which makes available trial transcripts to those who can afford them must provide a "means of affording adequate and effective appellate review to indigent defendants." *Id.* at 20. "Destitute defendants," the Court said, "must be afforded *as adequate appellate review* as defendants who have money enough to buy transcripts." *Id.* at 19 (emphasis supplied). "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19.

In *Burns v. Ohio*, 360 U.S. 252 (1959), this Court reaffirmed the *Griffin* doctrine, saying that "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." *Id.* at 257. "In all cases the duty of the State is to provide the indigent *as adequate and effective* an appellate review as that given appellants with funds—the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a non-indigent defendant with similar contentions." *Draper*

v. Washington, 372 U.S. 487, 496 (1963) (emphasis supplied). Accord: *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Long v. District Court of Iowa*, 385 U.S. 192 (1966); *Lane v. Brown*, 372 U.S. 477 (1963); *Smith v. Bennett*, 365 U.S. 708 (1961); *Eskridge v. Washington*, 357 U.S. 214 (1958); *Douglas v. California*, 372 U.S. 353 (1963).

B. If defendant had funds, he would have a transcript and a full appeal.

Illinois grants an appeal of right to indigent defendants convicted of "disorderly conduct," "interfering with a peace officer," or any other offense, whether prosecuted by the State or by the municipality. (*Infra* at 3a.)[1] Illinois also provides court reporters in all trials in the Circuit Courts, which are the lowest trial courts in Illinois. 37 Ill. Rev. Stat. §§ 651 *et seq.* (Smith-Hurd ed., 1970).[2] See, *e.g.*, Circuit Court of Cook County, General Order No. 17.6, "Official Court Reporter." A court reporter was in fact present and took notes at defendant's trial. Before these notes can be made up into a transcript, certified and delivered to defendant, a cash sum in the amount of approximately $300 must be paid to the Transcript Department of the Clerk's Office of the Circuit Court of Cook County, Illinois.[3]

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[1] Whether the appeal lies with the Illinois Supreme Court or with the Illinois Appellate Court depends upon the nature of the case or the nature of the contentions raised. Illinois Constitution of 1870, Article 6, §§ 5, 7 (*infra* at 3a). If a case is erroneously appealed to the wrong court, it is transferred without any loss of rights to the correct court. 110A Ill. Rev. Stat. § 365 (Illinois Supreme Court Rule 365).

[2] All citations to Ill. Rev. Stat. are, unless otherwise indicated, to the State Bar Association Edition (1969).

[3] Estimate received by counsel from the court reporter. The rate for transcription is $.25 per 100 words, 37 Ill. Rev. Stat. § 655 (*infra* at 6a-7a), or $.75 per page.

Because defendant is indigent, and solely because of that fact, he is deprived of that transcript on appeal.

C. Without a transcript, defendant will be denied the essence of his appeal.

From the face of defendant's contentions, it is clear that he must have the transcript to have any meaningful appeal.[4] He alleges that he was unjustly and improperly convicted, that there were grievous errors committed at his trial which

[4]The Fourteenth Amendment has been held to require an indigent appellant to be supplied with a transcript where it is available regardless of the demonstration of a "need" for it, because to force an indigent to rely on memory is inherently unequal and unfair. *Long v. District Court of Iowa*, 385 U.S. 192, 194-195 (1966); *Gardner v. California*, 393 U.S. 367, 369-370 (1969); *Milani v. Illinois*, 386 U.S. 12 (1967), reversing summarily *People v. Milani*, 34 Ill. 2d 524 (1966); *Roberts v. LaVallee*, 389 U.S. 40 (1967). Without a transcript, for instance, the ability to reverse for "plain error" is lost. See *Hardy v. United States*, 375 U.S. 277, 280, 288-289 (1964); Illinois Supreme Court Rule 615(a), 110A Ill. Rev. Stat. § 615(a). A transcript is "the obvious starting point" for appeal, *Gardner v. California*, 393 U.S. 367, 370 (1969), even for counsel that represented the defendant at trial. To deny trial counsel the transcript makes his memory—and not the court's full review or the fresh view of another counsel—the final arbiter of the points on appeal. Such inequality was held unconstitutional in *Eskridge v. Washington Prison Board, supra*, and *Draper v. Washington, supra*. But even beyond these considerations, the lack of a transcript for an indigent's appeal inevitably involves counsel in a moral and ethical dilemma—a double standard of responsibility between paying clients and indigent clients. See *e.g.*, ABA Code of Professional Responsibility Canons 2, 6 (Am. Jur. 2d "Desk Book," pp. 81, 103-104 (1970 Cum. Supp.)). This double standard also violates counsel's sense of minimal professional responsibility:

> "No responsible retained lawyer who represents a defendant at trial will rely exclusively on his memory (even as supplemented by trial notes) in composing a list of possible trial errors which delimit his appeal. . . . An appointed lawyer, whether or not he represented the defendant at trial, needs a complete trial transcript to discharge his full responsibility of preparing [the appeal]." *Hardy v. United States, supra* at 288 (Goldberg, J., concurring).

No showing of "need" for a transcript is therefore compatible with the Constitution.

made that trial a mockery of justice. As stated in defendant's post-trial motion (A. 11-23), it is expected the transcript will show that defendant, a third-year medical student without means, attended a march and rally conducted by various anti-war groups in Chicago, including SDS, not as a participant but as a "medical presence" (providing first aid assistance) under the aegis of the "Medical Committee for Human Rights," a national organization of doctors and medical students devoted to humanitarian causes. Defendant is not and never has been a member of SDS or any affiliated group. After a while, the marchers "broke" and ran. Defendant came upon an injured person lying in the street and, after a preliminary examination, diagnosed that the injured man, who was paralyzed from the waist down, had a "probable spine injury." Unheeding his protestations not to move the injured man without a stretcher, the police started to "drag him off." At this point defendant, in an attempt to keep the victim's spine "stable," placed his hands on the victim's stomach—and was thereupon arrested for disorderly conduct and interfering with the police. Over his protestations that this conduct did not constitute a crime, defendant was convicted by a jury. The defense of "necessity"—that his conduct was reasonably designed to avoid a great injury of overriding justification—was disallowed at trial (A. 16).

A transcript of proceedings is necessary in order for defendant to prove at least two points on appeal. Most importantly, he urges that the prosecutor, who at trial was still limping from an injury sustained during this very demonstration, was guilty of a sustained course of deliberate misconduct, which flagrantly prejudiced the jury against defendant. See *Berger v. United States*, 295 U.S. 78, 88 (1935); *People v. Stathas*, 356 Ill. 313, 321, 190 N.E. 661, 664 (1934). The burden is on defendant to prove this misconduct on appeal, and there is simply no way to do this without the transcript. Without it, defendant is unable to effectively support counsel's sworn statements to the Supreme Court of Illinois that (R. 10-11):

> "Throughout the trial, the prosecutor elicited testimony from witnesses regarding alleged violence at the march far removed from the immediate events surrounding appellant's alleged offense, regarding the political character of the march and regarding the fact specifically that Richard Elrod [now Sheriff of Cook County] had been injured during that particular march. The ingenuity and calculation with which the prosecutor steered testimony in these directions was quite remarkable. Consequently, a significant portion of the trial was occupied by defense counsel objections to these prejudicial and irrelevant lines of questioning. Defense counsel's objections were repeatedly sustained by the trial court. But the prosecutor was undeterred in his efforts to tar appellant before the jury with the brushes of anti-Americanism, violent proclivities and Richard Elrod's spinal injury. The prosecutor was so insistent in pursuing this course that these insinuations—in his very questions—time and again were placed before the jury, before defense counsel could object and the court could strike the questions. In his closing argument to the jury, the prosecutor repeated and enlarged upon these improper insinuations.
>
> "The prosecutor's conduct flagrantly violated the Canons of Ethics."

Defendant also alleges that the evidence was insufficient to sustain his conviction; more precisely, that certain testimony by the police was inherently incredible and that his defense of "necessity"—that his conduct was justified by the need to prevent great harm—was made out as a matter of law (A. 11-19). The net of this contention is that the Illinois Supreme Court should not reverse and remand for a new trial, but should discharge defendant entirely without subjecting him to a second prosecution.

Without a transcript, defendant is wholly unable to substantiate either of these contentions in appealing on the merits to the Illinois Supreme Court and must, as a practi-

cal and legal matter, forsake them.[5] Counsel elaborated this predicament in a sworn statement to that court (Supplemental R. 2, 2):

> "To sustain the allegations of error regarding insubstantiality of the evidence and the prejudicial impact of the prosecutor's misconduct on the record considered as a whole, the events at trial must be set out in the record in extensive and precise detail. Unless appellant has a full transcript he must rely essentially on his own and his trial counsel's memory. But because the trial lasted for three days, it is clear that many details which might ultimately be central to establishing (or, of course, rebutting) appellant's contentions have vanished from memory."

Defendant's need for a transcript is therefore patent. We turn to consider the effect of Illinois' alternate procedures on this need.

D. There is no adequate alternative to the transcript in this appeal.

It has long been recognized that a State need not "purchase a stenographer's transcript in every case where a defendant cannot buy it." *Griffin v. Illinois,* 351 U.S. 12, 20 (1956). "Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise." *Draper v. Washington,* 372 U.S. 487, 495 (1963). The fact that a rich person "may choose to waste his money . . . does not mean that the

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[5] Before an Illinois reviewing court can reverse on the grounds urged, it must consider "all the evidence," *People v. Gavurnik,* 2 Ill. 2d 190, 196, 117 N.E.2d 782, 785 (1954), the entire record, *People v. Gonzales,* 40 Ill. 2d 233, 242, 239 N.E.2d 783 (1968), and "where the record on appeal is incomplete, the reviewing court will indulge every reasonable presumption favorable to the judgment appealed from." *People v. Rockett,* 85 Ill. App. 2d 24, 228 N.E.2d 219, 223 (1967).

State must waste its funds. . . ." *Id.* at 496. If adequate, an agreed statement of the facts, a full narrative statement based on the trial judge's minutes or a bystander's bill of exceptions could all suffice.

The Illinois Supreme Court has adopted procedures for securing such substitute means of appeal—an agreed statement and a "settled" statement. Illinois Supreme Court Rule 323(c) and (d) (*infra* at 4a). But whatever the merits of these substitutes generally,[6] they are obviously completely inadequate here—they cannot present the minimum required factual basis for supporting defendant's contentions on appeal. If such substitutes were used, defendant would not be "heard." Such "process" could hardly be deemed "due."

Rule 323(c) provides that the appellant may prepare a proposed report of proceedings "from the best available sources, including recollection."[7] This "proposed report," if contested, is "settled" by the trial court and the report so "settled" is deemed "accurate" (*infra* at 4a). But defendant has amply demonstrated that the nature of his contentions requires him to present the Illinois Supreme Court with the kind of exact record which is wholly beyond his or anyone's capacity to reconstruct without a transcript. Moreover, if defendant had attempted to proceed under this Rule, he would have been placed in a procedural trap; if he had submitted a (necessarily woe-

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[6]See Illinois Civil Practice After Trial § 7.8, (Ill. Institute for Contemporary Legal Education, E. Kionka, ed. 1970) (casting doubt on the adequacy of the procedure for a settled statement); Subin, *Criminal Justice in a Metropolitan Court* 83 (Office of Criminal Justice 1966).

[7]An "agreed" statement would come from the same sources. Here, however, as the prosecuting attorney in his capacity as counsel for Appellee now concedes in this Court, agreement on the facts "in the instant case might be difficult or impossible" (Motion to Dismiss or Affirm at 6), because of the contention raised as to his own prejudicial misconduct.

fully inadequate) "proposed report," and it was "settled" or "agreed," he probably would be held to have bound himself to it by conduct inconsistent with the assertion of a right. See, *e.g., McCottrell v. Benson,* 32 Ill. App. 2d 367, 178 N.E.2d 144 (1961).

It is furthermore true that under Illinois law the burden of proof rests upon the Appellant to "substantiate matters contained in the contested report." *People v. Andrews,* 82 Ill. App. 2d 59, 227 N.E.2d 91, 94 (1967). Thus in "settling" the statement, the weight is not distributed evenly; it is tilted against the defendant. Not only is he forced to rely, as here, upon fleeting and incomplete memory, but then the burden is placed upon him to substantiate what it is he can barely, if at all, recall. And he must do so in the face of hostile and differing recollections by the prosecutor, and possibly even by the court. Unless their recollection agreed with his, his version—no matter how honestly prepared—would not be accepted. Such a procedure might be compatible with due process for General Motors, which can hire a team of stenographers to mark down the testimony during trial. But such a procedure, applied to an indigent and his counsel, does not even supply a rudimentarily fair procedure. It forces them to choose between being advocates and being reporters; no one can transcribe and conduct a trial at the same time.

Thus it is clear that defendant has no "means of presenting his contentions to the appellate court which are as good as those available to a non-indigent defendant with similar contentions." *Draper v. Washington,* 372 U.S. 487, 496 (1963). Indeed, without the transcript, he has *no means* of adequately presenting these contentions at all. Such a total deprivation of the right of effective appeal not only draws an "unreasoned distinction" between rich and poor in violation of the Equal Protection Clause, but it must also "offend the deepest presuppositions of our society" and violate Due Process as well. *Griffin v. Illinois,* 351 U.S. 12, 22 (1956) (Frankfurter, J., concurring).

Having determined that no alternative to his transcript could provide defendant with an "adequate and effective" appeal, we turn now to consider whether Illinois may constitutionally refuse to afford defendant that transcript.

E: Illinois may not deny free transcripts to indigents convicted of nonfelony offenses.

Illinois Supreme Court Rule 607(b) grants free transcripts for use on appeal to all indigents convicted of a "felony," but denies free transcripts to all indigents convicted of offenses which do not qualify as "felonies"—which eliminates all offenses not punishable by over a year's imprisonment.[8] Thus although defendant was convicted of violating two penal municipal ordinances, "disorderly conduct" and "interfering with a police officer," Illinois does not furnish him with a transcript on appeal even though, as has been shown, he is indigent and must have his transcript to adequately present his appeal.[9] These

[8]The line between "felony" and "misdemeanor" under Illinois law generally turns on whether the statute violated provides for imprisonment for over one year. 38 Ill. Rev. Stat. §§ 2-7, 2-11, 1-7(L); *People v. Bain*, 359 Ill. 455, 195 N.E. 42, 49 (1935). Thus a "felon" sentenced to probation gets a free transcript while a "misdemeanant" sentenced to a full term in jail gets none. Besides "felons," Illinois grants free transcripts to all indigent "minors" convicted of "delinquency," regardless of whether the "delinquency" would otherwise be considered a "felony" or a "misdemeanor." 37 Ill. Rev. Stat. § 702-2 (Pocket Parts 1971); Illinois Supreme Court Rule 661 (*infra* at 5a); *In Re Boykin*, 39 Ill. 2d 617, 237 N.E.2d 460 (1968). Ironically, "delinquency" even includes "threatening" to violate a "municipal ordinance." Also, any indigent appealing from a "post-conviction" hearing has a right to a free transcript both of his hearing and also of his trial. Illinois Supreme Court Rule 615; 37 Ill. Rev. Stat. §§ 163(f)(2), (f)(3). "Post-conviction" relief in Illinois is limited to felony prisoners sentenced to the penitentiary who allege denial of their constitutional rights. 38 Ill. Rev. Stat. §§ 122-1 *et seq.*; 1-7(L). This crazy-quilt patchwork is itself wholly arbitrary and unconstitutional.

[9]The Illinois history on transcripts is noteworthy. Before *Griffin*, free transcripts were provided to indigents only in capital cases. *Griffin v. Illinois*, *supra* at 14. Sometime after *Griffin*, a "felony"

ordinances are called "quasi-criminal" under Illinois law, a designation which means the offenses are considered "criminal in nature" but "civil in form."[10]

1. *Williams v. Oklahoma City* controls this case.

Whatever doubts may have been entertained about the scope of *Griffin v. Illinois*, a felony case, before 1969, it is now perfectly clear that Illinois' attempt to deny defendant a free transcript solely because he was not convicted of a "felony" violates the Fourteenth Amendment; such an attempt runs directly afoul of this Court's decision in *Williams v. Oklahoma City*, 395 U.S. 458 (1969). There, the indigent petitioner was convicted for violating a city ordinance against drunken driving, denominated "quasi-criminal" in nature, and received a 90-day jail sentence and a $50 fine. His motion for a free transcript for appeal was denied by the Court of Criminal Appeals on the ground that the "Fourteenth Amendment does not mandate 'that an indigent person, convicted for a violation of a city ordinance, quasi-criminal in nature and often referred to as

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case, the Illinois legislature, in its new Code of Criminal Procedure, amended the rule to provide broadly for free transcripts to indigents "upon imposition of any sentence in a criminal case." 38 Ill. Rev. Stat. § 121-13(a) (1964). Under a provision which allowed certain portions of the Code to be superseded by Supreme Court Rule, 110 Ill. Rev. Stat. § 121-1 (1965), this broad right was almost immediately restricted to felony cases only, by action of the Illinois Supreme Court. 110 Ill. Rev. Stat. 101-27(b) (1965) (now Rule 607(b)).

[10] *Village of Maywood v. Houston*, 10 Ill. 2d 117, 139 N.E.2d 233 (1956); *Village of Park Forest v. Bragg*, 74 Ill. App. 2d 87, 220 N.E.2d 61 (1966). These offenses are called "misdemeanors" if prosecuted by the State. 38 Ill. Rev. Stat. §§ 2-11, 26-1, 31-1. The Illinois Supreme Court has pointed out that:

> "The proceeding is not strictly or exclusively civil or criminal, but resembles both in some respects. For this reason, problems in this area cannot be solved by a mere labeling process, and the decisions of the courts, in Illinois and elsewhere, do not always have apparent logical consistency." *Village of Maywood v. Houston, supra*, 139 N.E.2d at 234.

a petty offense, is entitled to a case-made or transcript at city expense in order to perfect an appeal from said conviction.'" 395 U.S. at 459.

This Court, citing *Griffin*, reversed in an unanimous *per curiam* opinion, and stated that since Oklahoma has established the right to appellate review of drunken driving convictions, the State cannot "impede open and equal access to the courts . . . [so that it] wholly denies any right of appeal to this impoverished petitioner, but grants that right only to appellants from like convictions able to pay for the preparation" of a trial transcript. 395 U.S. at 459-460.

Williams v. Oklahoma City made clear that Griffin applies to penal offenses in municipal and traffic courts as well as in felony courts, and compels Illinois to afford defendant a free transcript here. The characterization of a penal offense by one name or another is irrelevant to an indigent person's right to equal and adequate review. An "invidious discrimination" is not less so because the possible penalty for the offense is imprisonment for over one year. The Fourteenth Amendment applies regardless of the size of the possible penalty or the penalty actually imposed. See *e.g.*, *Groppi v. Wisconsin*, 400 U.S. 505 (1971); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) ($10 fine). As this Court held in *Smith v. Bennett*, 365 U.S. 708, 712 (1961), in voiding a $4 filing for habeas corpus applications:

> "We shall not quibble as to whether in this context it be called a civil or a criminal action. . . . The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels."

2. *Williams v. Oklahoma City* cannot be distinguished on the basis of the penalty imposed or the seriousness of the offense.

The offense in *Williams v. Oklahoma City* was "drunken driving" and the penalty was 90 days in jail and a $50 fine. Defendant here was convicted of "disorderly conduct" and "interfering with a peace officer," was subject to a fine of

$1,000 on both charges, and was actually fined $500. Being indigent, defendant cannot pay the fines, and Illinois law provides that failure to pay a fine subjects defendant to imprisonment at the rate of $5 per day. 24 Ill. Rev. Stat. § 1-2-9 (1969) (*infra* at 7a). Thus under Illinois law, defendant faces 100 days in jail, almost one-third of a year.[11]

No distinction between this case and *Williams v. Oklahoma City* can be based on the fact that defendant here faces, at lease initially, the penalty of a serious fine rather than imprisonment. As noted, imprisonment for nonpayment is a distinct and present possibility under Illinois law even after *Tate v. Short*, ____U.S.____, 91 S.Ct. 668 (1971). But even apart from that, no distinction between jail and a serious fine is tenable. Who is to say whether a poor person would prefer 30 days, or 60 days, or 90 days, to $500 or $1,000 as a penalty? The imposition of a $1,000 fine, or a $500 fine, on a poor person (or even on a person of moderate means for that matter), is *a substantial and serious burden to the conduct of everyday life.* A poor person's interest in avoiding that burden is "compelling." The State's interest in raising revenue by taxing transcript costs is, by comparison (and especially as applied to those unable to

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[11]In *Tate v. Short*, ___ U.S. ___, 91 S.Ct. 668 (1971), this Court held that a State may not imprison a person for failure to pay a fine, if that failure arises solely from an inability to pay, without first resorting to some alternative collection procedure. The Court was careful to indicate, however, that the decision is not "to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means." *Id.* at 672. While that contingency was left an open question, the execution of defendant's sentence here by the Illinois courts will not "await the presentation of a concrete case" in this Court. Thus the jail "contingency" is very real and immediate to him. Because of this inescapable fact; *Williams v. Oklahoma City* is indistinguishable on the basis of the penalty imposed and controls here.

pay), weak and insubstantial. *Cf. Boddie v. Connecticut*, ____ U.S. ____, 91 S. Ct. 780 (1971). See discussion, chapter III, post.

Most importantly, the civil consequences of convictions for these types of offenses are broad-ranging, nebulous, and serious. Defendant here is an impecunious medical student who in a few years will apply for a license to practice medicine. In New York, where he currently resides, an applicant must submit proof of "good moral character." 16 McKinney's Consol. Laws of N.Y. Anno. § 6506(2). See also Illinois "Medical Practice Act," 91 Ill. Rev. Stat. §§ 4(2); 14(2).[12] In New York, a physician's license to practice medicine can be revoked upon the showing of conviction of "a crime" or for "unprofessional conduct." 16 McKinney's Consol. Laws of N.Y. Anno. §§ 6514(2)(b) and (g). The standards of enforcement are vague and largely discretionary. There is no way of telling whether defendant's convictions here will preclude him from the practice of his chosen profession. Such a consequence makes absurd the contention that a penal offense is not serious simply because it does not directly involve a term in jail.[13]

It would certainly be hard to try to erect a distinction between this case and *Williams v. Oklahoma City* based upon the relative moral "seriousness" of the offenses charged. Being caught at "drunken driving" certainly involves no more (indeed probably less) moral stigma than knowingly

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[12]Compare attorneys' "Rules on Admission and Discipline of Attorneys," 110A Ill. Rev. Stat. § 701(a); *cf. In Re Anastaplo*, 18 Ill. 2d 182, 163 N.E.2d 429, *aff'd* 366 U.S. 82 (1961) (refusal to answer questions concerning possible "subversive" activities is sufficient evidence of lack of "good moral character"). The standard for disbarment is a practice "which tends to defeat the administration of justice or to bring the courts and the legal profession into disrepute." 110A Ill. Rev. Stat. § 751(a).

[13]Furthermore, the fact that these offenses appear on defendant's police criminal record, which often is furnished to prospective employers, is itself a disability of important magnitude. See *In Re Gault*, 387 U.S. 1, 24-25 (1967).

"interfering with a police officer" in the performance of his duties, and probably less than engaging in "disorderly conduct" or creating a "breach of the peace" as well. Both "interferring" and "disorderly conduct" are "penal" laws,[14] involving a certain degree of "moral delinquency" in common usage and also as that term has been applied. *Cf. Schick v. United States,* 195 U.S. 65 (1904); *Wisconsin v. Constantineau,* 400 U.S. 433 (1971). They are offenses which the common law would probably have categorized as *"malum in se,"* not *"malum prohibitum"* being acts of putative "moral turpitude." *Cf. District of Columbia v. Colts,* 282 U.S. 63 (1930) ("reckless driving" subjecting offender to $100 and 30 days is *malum in se* because it is an act of "obvious depravity.")[15] That is, it doesn't take the existence of any law for one to know that it is wrong to interfere with a policeman performing his duties or even to disturb others by disorderly conduct. Moreover, how can an offense which, if charged by the State rather than by the City, subjects a citizen to a year in jail[16] be anything but stigmatizing and

[14]See *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-170 (1963); "Defending an Illinois Proceeding for Violations of a Municipal Ordinance: The Worst of All Possible Worlds," 1 Loyola Chi. L. J. 86 (1970).

[15]See also *United States v. Smith,* 420 F.2d 428 (5th Cir. 1970) ("possession of untaxed whiskey" is an act of "moral turpitude"); Note, "The Distinction Between Mala Prohibitia and Mala in Se in Criminal Law," 30 Colum. L. Rev. 74, 77-78 (1930); Note, "Crimes Involving Moral Turpitude," 43 Harv. L. Rev. 117, 119-120 (1929). Forms of "disorderly conduct," usually involving sexual interest or display, have been held to be acts of "moral turpitude" subjecting the actor to deportation or exclusion from the country under the immigration laws. See *Babouris v. Esperdy,* 269 F.2d 621 (2d Cir. 1959); *Wyngaard v. Kennedy,* 111 U.S. App. D.C. 197, 295 F.2d 184 (D.C. Cir. 1961).

[16]Both "interfering" and "disorderly" are State as well as city offenses; indeed the City's ordinances were modeled on the State statutes. With "disorderly," the penalties are the same, but with "interfering," the State penalty is greater. See *infra* at 1a-2a. Whether the police choose to bring charges under the State or the city provisions is entirely in their discretion.

serious? *Cf. In Re Gault*, 387 U.S. 1 (1967); *In Re Winship*, 397 U.S. 358, 367 (1970).

Illinois has indicated the importance it ascribes to trials for violations of penal municipal ordinances by providing for the right to a trial by jury.[17] Defendant was tried by jury here (A. 3-6). This conclusion by the State as to the importance of the just resolution of these types of violations should be considered determinative by this Court of any possible contention that defendant's convictions are somehow too "trivial" to merit protection by the Fourteenth Amendment.[18] *Cf. Duncan v. Louisiana*, 391 U.S. 145, 160 (1968). It is absurd to say that an offense is "trivial" when the State has deemed it significant enough to provide a jury for the protection of the citizen. *Cf. Waller v. Florida*, 397 U.S. 387 (1970) (double jeopardy bars state trial after municipal trial). Such an erroneous notion of "triviality" was firmly rejected recently in *Tate v. Short*, ___ U.S. ___, 91 S.Ct. 668 (1971), in which this Court unhesitatingly applied the Equal Protection Clause to a fine of $425 imposed for some "traffic offenses," where an indigent was incarcerated for failure to pay. Defendant here,

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[17]Although Illinois law on the point is not totally explicit, it seems clear that, whether these ordinance violations are considered "civil" or "criminal," such a right is given by Article II, § 5 or § 9 of the Constitution of Illinois 1870 (*infra* at 2a-3a). Opinions of the Attorney General of Illinois 1912, p. 701; 110 Ill. Rev. Stat. § 64 (1969); 110A Ill. Rev. Stat. § 285 (small claims); *People v. Ford*, 45 Ill. App. 2d 289, 196 N.E.2d 1 (1963).

[18]This would not mean that a line could not be drawn in a later case such as was drawn in *Ex Parte Johnson*, 20 Okla. Cr. 66, 201 p. 533, 537 (1921), at a $20 fine, which would exclude parking tickets and minor traffic infractions. These types of violations are most often subject to "summary disposition" and do not fall within the jury requirement. Also, they are considered "regulatory" rather than "penal," because they are sanctions ancillary to a legislatively-created system of regulation of conduct which would not otherwise be deemed subject to punishment. See Note, 30 Colum. L. Rev. 74 (1930); Note, 43 Harv. L. Rev. 117 (1929), *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-170 (1963).

an indigent faced with the severe burden of a substantial fine, the loss of his good name and reputation, the possible loss of his chosen profession, and possible incarceration for non-payment, deserves no less.

Therefore, defendant should have received a free transcript under the prior decision of this Court in *Williams v. Oklahoma City*.

II.

REGARDLESS OF THE CONTROLLING FORCE OF *WILLIAMS V. OKLAHOMA CITY*, BOTH EQUAL PROTECTION AND DUE PROCESS PRINCIPLES REQUIRE ILLINOIS TO FURNISH A TRANSCRIPT TO AN INDIGENT NONFELONY APPELLANT.

As has been shown, the decision of this Court in *Williams v. Oklahoma City*, 395 U.S. 458 (1969), requires that Illinois furnish defendant with a free transcript so that he may enjoy an "adequate and effective" appeal. Even apart from the controlling impact of *Williams*, however, many other decisions of this Court, elaborating the basic nature of the equal protection and due process guarantees, support the view that appellant must be provided with a free transcript.

Transcript cases in this Court have tended not to distinguish between the Equal Protection and Due Process clauses. The reason is that both concepts often apply with equal force. As the Court stated in *Griffin v. Illinois* (351 U.S. at 17):

> "In this tradition, our own constitutional guarantees of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'

Chambers v. Florida, 309 U.S. 227, 241. See also, *Yick Wo v. Hopkins*, 118 U.S. 356, 369." See also *Williams v. Illinois*, 399 U.S. 235, 241-242 (1970).

This case tests whether "in every American court" means what it says.

A. The Equal Protection Clause: Illinois Transcript Policy Denies Equal Protection to Poor Persons Appealing From Nonfelony Convictions.

Equal Protection requires that a State, in pursuing its proper purposes, must avoid benefiting or depriving certain groups and not others where to do so is not in rational furtherance of its proper goals.[19] Where fundamental constitutional rights are at stake—here the citizen's right to be free of unwarranted penal sanction—or where the persons affected are not "volunteers" in the judicial process—here indigents convicted of crime—this Court "will squint hard" at the State's classification and require a "compelling interest" to justify the State's burden on or failure to benefit one class. See *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

It has long been clear that "money hurdles" to the judicial machinery work an intolerable and unjustifiable burden in fact upon one class—those too poor to pay—without having even the virtue of satisfying the revenue purpose behind the money requirement:

> "Courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to rich and poor alike. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to indigent plaintiffs altogether. Where money determines not

[19] While the Illinois rule may seem non-discriminatory on its face, this Court has uniformly found a transcript-cost law such as Illinois' "grossly discriminatory in its operation" as applied to indigents. *Griffin v. Illinois, supra*, at 17, n. 11; *Williams v. Illinois*, 399 U.S. 235, 242 (1970).

> merely 'the kind of trial a man gets,' *Griffin v. Illinois, supra,* at 19, but whether he gets into court at all, the great principle of equal protection becomes a mockery. A State may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee. *Cf. Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966)." *Boddie v. Connecticut,* ____ U.S. ____, ____, 91 S.Ct. 780, 792 (1971) (Brennan, J., concurring).

It ill behooves the great purpose Illinois has set for itself—to ensure justice by providing official court reporters and the right to appeal to all persons charged with *any offense*—to draw that "unreasoned" and "invidious" line between rich and poor citizens trapped in the criminal process by *itself* erecting a "money hurdle" to full access to its appellate courts in all cases which are not classified as "felonies." *Griffin v. Illinois,* 351 U.S. at 23 (Frankfurter, J., concurring). See *Harper v. Virginia Board of Elections, supra; Tate v. Short,* ____ U.S. ____, 91 S. Ct. 668 (1971). Imposing a money hurdle to an appeal is no less a denial of equal protection because it takes the form, as here, of a statutory fee for a transcript which is necessary to present a contention on appeal, than it is when a simple filing fee itself is involved. See *Smith v. Bennett,* 365 U.S. 708 (1961); *Burns v. Ohio,* 360 U.S. 252 (1959). Here there is clearly no "compelling state interest" which can be advanced to defeat the demands of the Equal Protection Clause. The State's interest in ensuring that those benefiting from the provision of transcripts pay for them cannot apply to one who by definition cannot pay. As this Court said in *Tate v. Short,* ____ U.S. ____, 91 S. Ct. 668, 671 (1971):

> "Imprisonment [for non-payment of a fine] . . . is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant can't pay because he is indigent. . . ."

And the State's fiscal interest in avoiding the minimal extra costs[20] of providing free transcripts to indigents convicted

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[20] See Section III, post.

of nonfelony offenses is hardly "compelling."[21] See *Griffin v. Illinois*, 351 U.S. 12 (1956); *Shapiro v. Thompson*, 394 U.S. 618 (1969); see also *Boddie v. Connecticut*, *supra* at 788.

B. The Due Process Clause: Denying Convicted Indigents Full Appellate Hearings is Fundamentally Unfair and Violates Due Process of Law.

Illinois Supreme Court Rule 607(b) (*supra* at 2-3) precludes the Illinois Supreme Court from considering those substantial contentions of error, raised by an indigent nonfelony defendant, which require a transcript to prove. While granting an indigent an appeal in form, Illinois is thus denying him a hearing in substance. This is surely giving the poor at best "the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas v. California*, 372 U.S. 353, 358 (1963). Such a "mutilation of the right to appeal" is fundamentally unfair. (*Preston v. Municipal Court*, 188 C.A. 2d 76, 10 Cal. Reptr. 2d 301, 306 (1st Dist. Ct. App. 1961).)

As this Court said about a similar procedure:

> "What was impermissible was the total denial to petitioners of any means of getting adequate appellate review on the merits in the State Supreme Court, when no such clog on the process of getting contentions before the State Supreme Court attends the appeals of defendants with money." *Draper v. Washington*, 372 U.S. 487, 498 (1963).

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[21] Additional conceivable State interests such as ensuring the "bona fides" of indigency and protecting against frivolous appeals can be satisfied by "penalties for false pleadings or affidavits, and actions for malicious prosecution or abuse of process, to mention only a few." *Boddie v. Connecticut*, *supra* at 788. And traditional civil processes, such as garnishment and attachment, and possibly probation with a work condition, are available to enforce the debt against a recalcitrant. See *Williams v. Illinois*, *supra* at 244, n. 21.

Regardless of whether a constitutional right to appeal exists,[22] a State may not, consistent with due process, create an appellate system which hears cases not according to their merits but according to the wealth of their participants—an arbitrary system unrelated to the great purpose of vindicating rights by appeal. As part of the *only available* "dispute-settling" mechanism for a citizen forced to defend himself from accusations of crime, the appellate court system must be open to his pleas of injustice without regard to whether he can pay a sum. This result is required if the State's monopoly over the means of settling disputes is to remain legitimate in our society. See *Boddie v. Connecticut*, ___ U.S. ___, 91 S.Ct. 780 (1971). The central position of our courts in reinforcing the deepest values of our culture would be grossly undermined by a ruling that equality before the law is not due to ninety percent of our citizens faced with accusation or conviction of crime.[23]

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[22]The fact that an appellate system has existed in all states for many years indicates its fundamental nature and casts renewed doubt on *McKane v. Durston*, 153 U.S. 684, 687-688 (1894). *Cf. e.g., Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Benton v. Maryland*, 395 U.S. 784 (1969) (cases overruling prior cases).

[23]"90 percent of the Nation's criminal cases are heard in the lower courts." *President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts* 29 (U.S. Government Printing Office, 1969). "Few citizens ever have contact with the higher courts. In the main, it is the police and the lower court Bench and Bar that convey the essence of our democracy to the people. Justice, if it can be measured, must be measured by the experience the average citizen has with the police and the lower courts." Patrick V. Murphy, Police Commissioner of New York City, in "The Role of the Police in Our Modern Society," The Record of the Association of the Bar of the City of New York, Vol. 26, No. 4, p. 292, 293 (April, 1971).

III.

GRANTING DEFENDANT HIS TRANSCRIPT WILL NOT UNREASONABLY BURDEN THE STATE.

It may be anticipated that the City will argue that defendant, and like-situated indigents, should be denied his Fourteenth Amendment right to a free transcript for appeal because to grant him his right might somehow irreparably burden the State fiscal system. Prior holdings of this court indicate that, as applied here, this argument is not legitimate or relevant at all. For example, in *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), holding unconstitutional a one-year residency requirement for welfare benefits, this Court stated flatly that:

> "We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. . . . But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification."[24]

However, if such an argument is legitimate, a heavy burden is upon the State to prove that its financial interest in defeating defendant's Fourteenth Amendment right to "equal and open access" to appeal is "compelling." *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

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[24]And this Court stated in *Williams v. Illinois*, 399 U.S. 234, 245 (1970):

> "The constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo."

Moreover, this "cost-burden" argument has been rejected, explicitly or implicitly, in every case in this Court involving procedural due process rights, especially in indigent transcript cases. See *Griffin v. Illinois*, 351 U.S. 12 (1956); *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *cf. In Re Gault*, 387 U.S. 1, 15 n. 14 (1967) (juvenile proceedings); *Boddie v. Connecticut*, ___ U.S. ___, 91 S. Ct. 780 (1971) (filing fee for divorce); *Gideon v. Wainright*, 372 U.S. 335 (1963) (right to counsel at trial); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (right to counsel at preliminary hearings).

This heavy burden cannot be met. Rather, available figures overwhelmingly suggest that the total cost of providing free transcripts on appeal from nonfelony convictions to indigents needing them will probably be even less than the cost of providing such transcripts in felony cases, which is itself not very great. For the *entire State of Illinois* in 1970, the cost of supplying free transcripts to indigents appealing (felony) convictions was only $223,474.[25] Thus, the argument that granting indigent persons who chose to appeal their convictions for nonfelony offenses a free transcript if they need it will "break the back" of the States' fiscal system is both wholly unsupported by the evidence and ludicrous in terms of comparable expenditures of State or local funds for other purposes.[26]

Those who argue the burdensomeness of allowing the exercise of an indigent's Fourteenth Amendment rights to a transcript in nonfelony cases do so by pointing to an obvious but highly misleading fact: that there are many

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[25] Information supplied by the Chicago office of the Administrative Office of Illinois Courts. See also, *The Illinois State Budget Fiscal 1972*, p. 26, submitted to the 77th General Assembly by Richard Ogilvie, Governor. By contrast, the Circuit Court of Cook County, Illinois, took in as revenue almost twice that amount in "library fees" alone in 1970, and indeed had a total revenue of over $31 million, principally from fines. *Statistical Report, Cases, Fees, Fines and Cost, Dec. 1-Nov. 30, 1967-1970*, 1 (prepared for the Circuit Court of Cook County by its Clerk, Matthew Danaher) [hereinafter "Danaher Statistical Report"]. Cook County and the City of Chicago together appropriated for 1971 for "civil defense" over double the amount of total Illinois transcript costs. *The Annual Appropriation Ordinance of the City of Chicago for 1971*, Journal of Proceedings of the City Council, Dec. 11, 1970 at 9612; *The Annual Appropriation Bill of Cook County for the Fiscal Year 1971* p. 112.

[26] For example, the annual budget of the City of Chicago for the Bureau of Sanitation is over $45 million, the Fire Department is over $72 million and the Police Department is over $210 million. *The Annual Appropriation Ordinance of the City of Chicago for 1971*, Journal of Proceedings of the City Council, Dec. 11, 1970, at p. 9593, 9594, 9596.

more arrests and convictions for misdemeanor and ordinance violations each year than there are for felony violations. In the District of Columbia, for example, one thorough study showed a nonfelony-felony arrest ratio of about 28 to 1.[27] And in 1970 in the Circuit Court of Cook County, Illinois, there were only 5,184 felony determinations, excluding pleas or dismissals at preliminary hearing,[28] while in Chicago in the same year there were over 1 million final nonfelony (misdemeanor, ordinance and traffic) determinations.[29] For reasons which will become apparent, however, the magnitudes implicit in these relationships do not carry through into the appellate docket; indeed, these figures bear absolutely no relation to the probable relative costs of providing free transcripts to indigents convicted of felony as opposed to nonfelony offenses.

Four reasons account for this result: (1) the vast majority of nonfelony charges is disposed of without trial—by forfeiture, plea or dismissal;(2) of those that result in conviction after a trial, very few are appealed; (3) very few that are appealed require a transcript; and (4) since most nonfelony trials are very short in duration, those transcripts that are required on appeal are not lengthy.

The first reason—the high rate of dispositions without trial—is highly significant on two grounds: first, it shapes

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[27]In 1965, there were about 176,000 adult arrests for ordinance violations and minor misdemeanors, and only 6,266 felony arrests in the District of Columbia. *Report of the President's Commission on Crime in the District of Columbia*, 232, Figure 1. (U.S. Government Printing Office 1966.) [Hereinafter "D.C. Crime Commission."]

[28]"Determinations" include acquittals, dismissals, and guilty pleas, as well as convictions. *Danaher Statistical Report, supra* at 5 (computed). Of course, excluding those final determinations which occur at the preliminary hearing stage disproportionately enlarges the resultant comparison.

[29]*Danaher Statistical Report, supra* at 10, 12 (excludes parking tickets); *Administrative Office of the Illinois Courts, Statistical Bulletin for the Calendar Year 1969*, p. 6.

the size of the category "convictions after trial," which is the total universe of cases in which there could possibly be an appeal and a transcript (excluding transcripts of guilty pleas); second, the rate of dispositions without trial is totally inelastic to possible expansion because of the announced availability of transcripts on appeal to qualifying indigents—that is, no one is going to fail to plead guilty, or refuse to permit the dismissal of his charges, or press his right to trial instead of accepting forfeiture simply because, if indigent, he is assured of a transcript on appeal.

It is a simple and oft repeated fact that the number of actual convictions after trial in nonfelony cases nowhere near approximates the number of charges filed or arrests made. In Chicago, for example, of slightly over 1 million nonfelony determinations in 1969, including misdemeanors, ordinance violations and traffic, approximately 800,000 were in traffic cases,[30] the vast bulk of which were forfeitures or mail-in fines.[31] Because Illinois does not keep statistics appropriate to the task, it is not possible to determine with exactness how many of these 800,000 traffic cases resulted in a trial and conviction. However, in New York City, of 2 million such traffic cases recorded in 1964 and 1965, 98% resulted in non-appealable pleas of guilty.[32] Presumably the situation in Illinois and elsewhere would be the same. Con-

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[30] Administrative Office of the Illinois Courts, *Statistical Bulletin, supra* note 29 (excludes parking tickets). There were 809,287 final traffic determinations in Chicago in 1969. In 1969-1970 in Chicago there were only 24,376 convictions after court hearing in parking cases out of 2,833,325 complaints filed. *Danaher Statistical Report, supra* at 12.

[31] See Annual Report of Administrator of U.S. Courts, 1969, pp. 98-99 (U.S. Government Printing Office); *D.C. Crime Commission, supra* at 231.

[32] Figures come from the New York Court of Appeals in *People v. Letterio*, 16 N.Y.2d 307, 213 N.E.2d 670, 674 (1965) (dissenting opinion of Chief Justice Desmond).

victions after trial account for a tiny fraction of the remaining 2%, which also includes dismissals, acquittals and decisions not to appeal. Most importantly, as Chief Justice Desmond of the New York Court of Appeals notes:

> "Since almost all of these defendants [in traffic cases] are either owners of automobiles or employed as drivers of automobiles the number who could successfully plead indigence would be very small indeed." *People v. Letterio*, 16 N.Y. 2d 307, 213 N.E. 2d 670, 674 (1965) (dissenting opinion).

Thus traffic cases—accounting for the vast bulk of nonfelony convictions—are not a fertile source for indigent transcript appeals.[33]

Excluding traffic cases, Chicago in 1970 recorded 38,849 findings of guilty in nonfelony cases (all misdemeanor and ordinance offenses) including both convictions after trial and also pleas of guilty. There were 2,800 total guilty findings in felony cases, thus indicating a 14 to 1 proportion between nonfelonies and felonies as to total guilty determinations (excluding traffic cases), including guilty pleas.[34] In order to arrive at the total universe of "convictions after trial," which defines the outer limits of possible free transcript requests, the guilty pleas must be removed from this proportion. When that is done, the proportion is reduced to about 3 or 4 to 1 nonfelony to felony convictions after trial.[35] For the City of Chicago in 1970, this means under

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[33]Moreover, most of these cases are not "penal" but are "regulatory" as that term has been defined, and do not involve serious fines or jail, culpability, and stigma as do defendant's offenses. See discussion at note 18, *infra*.

[34]Felony figures are for all Cook County and not just Chicago because Chicago felony figures are not available. *Danaher Statistical Report, supra* at 5, 10.

[35]Because no figures are available for percent of guilty pleas in nonfelony cases in Chicago, this computation unfortunately must be accomplished somewhat indirectly. We know that 81.3% (or 2,274)

2,000 total possible nonfelony free transcript requests, assuming everyone who was convicted was indigent, decided to appeal, and needed a transcript to do so. Of course such assumptions are utterly unreal.

In order to arrive at a proper estimate of the cost of supplying transcripts to indigent appellants in nonfelony cases relative to felony cases, this 3 or 4 to 1 proportion applicable to "convictions after trial" must be further refined in the light of the three significant factors mentioned before: (1) fewer nonfelony than felony convictions are actually appealed, (2) fewer nonfelony than felony appeals probably require transcripts, and (3) the average nonfelony trial (and thus transcript) is far shorter than the average felony trial.

As to the first factor, the relative number of nonfelony appeals, it is a striking fact that our appellate systems are so relatively free of them. A study of the appellate system in Washington, D.C., for example, found that felony appeals outnumber nonfelony appeals by 3.4 to 1.[36] Although one might argue that making free transcripts available to indi-

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of the felony convictions in Chicago in 1970 followed guilty pleas, and 18.7% (or 526) did not. *Danaher Statistical Report, supra* at 5. Figures from other cities show a remarkably uniform 95% nonfelony guilty plea rate. There is no reason to believe Chicago is atypical in this regard. Applying this 95% rate to Chicago would mean that there were 36,900 guilty pleas and 1,945 convictions after trial in nonfelony cases in 1970. See Jennings, *The Flow of Arrested Adult Defendants Through the Manhattan Criminal Court in 1968 and 1969* (1970), p. 6 (calculated from Table 2); Newman, *Conviction: The Determination of Guilt or Innocence Without Trial*, 1, n. 1 (1966); Oaks & Lehman, *A Criminal Justice System and the Indigent*, p. 147, n. 344 (1968).

[36]In 1965, there were 237 felony appeals filed and only 70 appeals in all misdemeanor, ordinance and traffic cases. *D.C. Crime Commission, supra* at p. 302, Table 35; p. 290, Table 28. In the District at the time of this study, convictions resulting in fines of $50 or more, or any confinement, were appealable of right, while those sentenced to less than $50 had to apply for the allowance of an appeal. 11 D.C. Code § 741 (Supp. V, 1966).

gents in nonfelony appeals will narrow this margin, such a result seems highly improbable. Rather, it seems that the "demand" for appeals by indigents in nonfelony cases is almost totally inelastic with respect to the furnishing of free transcripts; that is, the rate of appeal does not depend upon the availability of free transcripts. This is because it is not the lack of free transcripts for indigents that is restricting the flow of appeals in these cases, but other factors relating both to the burden of appeal relative to possible gains where serious penalties are not involved—delays, prolongation of uncertainty, probability of affirmance, and the like—and also, and most importantly, to the fact that most indigents serve out their sentences or "work off" their fines before their appeals can be heard because of their inability to post pretrial or post-trial bail.[37]

The second important factor reducing the relative cost of transcripts for nonfelony appeals proportionate to felony

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[37] ". . . [A] convicted misdemeanant has little incentive to appeal; he would usually have served his sentence before the appeal could be heard." Oaks & Lehman, *A Criminal Justice System and the Indigent*, p. 146 (1968). A study of "serious misdemeanors" in the District of Columbia revealed, for example, that only 31 of 792 defendants convicted after trial appealed, whereas for felonies 237 of 265 defendants convicted after trial appealed. *D.C. Crime Commission, supra* at 241, 275. In Illinois, as in many states, time served while awaiting trial is credited against any sentence or fine received after conviction, at the $5 per day rate for fines. See 38 Ill. Rev. Stat. § 119-3; *People v. Carroll*, 76 Ill. App. 2d 9, 221 N.E.2d 528 (1966); *cf. Tate v. Short*, ___ U.S. ___, 91 S. Ct. 668 (1971). Surveys show that large percentages of felony defendants are incarcerated before trial for inability to make bail; sample figures in large urban areas run from 79% of defendants in St. Louis, 75% in Baltimore and 71% in Miami to 54% in Boston, 48% in Detroit and 44% in New Orleans. Freed and Wald, *Bail in the United States: 1964*, 40-41. Presumably nonfelony percentages would run somewhat smaller because lower bonds are usually set, but the indigent who might later need a free transcript is by definition far less likely than the average arrestee to be able to find bond money for pre-trial or post-trial release.

appeals below the 3 or 4 to 1 ratio applicable to "convictions after trial," is the fact that the overwhelming proportion of nonfelony trials are short and perfunctory, requiring, if appealed by indigents, only very brief transcripts if transcripts are needed at all. For example, one careful observer of an urban court processing serious misdemeanors found that "the great majority of trials are completed within an hour." Subin, *Criminal Justice in a Metropolitan Court*, p. 82 (Office of Crim. Justice 1966). In ordinance cases, another study calculated an average disposition time of 2 minutes per case. *D.C. Crime Commission, supra* at 280. Clearly, then, the average length of the transcript decreases with the seriousness of the offense. At 75¢ or less per page, the "burden" to the State of furnishing indigents with free transcripts in these brief ordinance cases would be trivial.[38] And the brevity of the usual case suggests that, unlike defendant's case here, reconstruction of the evidence apart from a transcript is ordinarily feasible.

As to the third factor—the relatively less frequent need for a transcript in nonfelony appeals, the important relationship is the relative incidence of juries in felony and nonfelony trials. The importance of the presence or absence of a jury for purposes of appeal lies in the fact that few appellate courts consider close questions of prejudice through the improper admission of evidence or improper argument or conduct in non-jury cases, and thus few convictions involving that sort of issue will be appealed.[39] In this regard it is a fact that very few ordinance and misdemeanor cases are tried before juries even where juries are available. Although figures are scarce, those available from Oklahoma City show slightly over 1% of ordinance charges filed result in jury

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[38]See 37 Ill. Rev. Stat. § 655 (statutory rate of $.25 per 100 words).

[39]For felony appeals, reversals by one court of last resort turned on legal issues not requiring a transcript in 68% of the cases. *D.C. Crime Commission, supra* at 314, Table 46 (computed).

trials,[40] and those from the District of Columbia show slightly over 2½% of "serious misdemeanor" charges filed result in jury trials.[41] In felony cases, on the other hand, in some locations it is the rare case which does not go to the jury. In the District of Columbia in 1966, for example, less than one out of every ten trials was before a judge without a jury, *D.C. Crime Commission, supra* at 246, Table 7, and nationally, about 60 percent of trials for major crimes are before juries. Kalven & Zeisel, *The American Jury*, 18, Table I (1966).

In summary, the evidence clearly demonstrates that the total cost of providing nonfelony indigents with transcripts will most likely be *less* than that for felony indigents.[42] Thus the exercise by indigents convicted of nonfelony offenses of their right to a free transcript on appeal will not unreasonably "burden" the State's fiscal system. That treacherous notion must be finally interred.

Two further considerations are important. First, several of the most populous states in this country already grant free transcripts to all indigent defendants needing them

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[40]Of 2.305 ordinance charges filed in Oklahoma City in 1968, only 30 went to jury trial. Brief of Petitioner at 45, Appendix C, *Williams v. Oklahoma City*, 395 U.S. 458 (1969) (Oct. Term 1968, No. 841); see also Kalven & Zeisel, *The American Jury*, 18, n. 12 (1966).

[41]*D.C. Crime Commission, supra* at 275, Figure 4.

[42]Moreover, to lower costs still further a state might choose to institute an installment payment plan for those with some income, but which is insufficient to permit lump sum payments. See *Tate v. Short*, ___ U.S. ___, 91 S. Ct. 668 (1971); *Williams v. Illinois*, 399 U.S. 235, 244-45, 264 (1970); *Rinaldi v. Yeager*, 384 U.S. 305 (1966). Such a system would appear to be effective; the appellant, seeking benefits from the court, has an incentive to repay. A survey of one State's practice of seeking repayment for appointed counsel as a condition of probation, a closely analogous situation, found that "this condition of probation is rarely, if ever, violated." *Kamisar & Choper*, "The Right to Counsel in Minnesota: Some Field Findings, and Legal-Policy Observations," 48 Minn. L. Rev. 1, 24 (1963).

regardless of the nature of the offense for which they were convicted. Indeed, in New York this rule derives from state law and long preceded *Griffin v. Illinois.* If providing free transcripts to all persons needing them and unable to pay for them does not unreasonably burden New York and California,[43] among other states, it will not do so to Illinois. And more states are now undertaking to provide free *counsel* for the *trial* of municipal and traffic cases—a far more "burdensome" undertaking than a transcript for appeal. See, *e.g., Rodriguez v. Rosenblatt,* Supreme Court of New Jersey, September Term 1970, No. A-77, Decided May 10, 1971.

Secondly, it ill behooves a city in which the judicial system returns an enormous revenue into local coffers to argue that improving the quality of justice, by providing indigents with free transcripts (and thereby incurring relatively insignificant marginal or additional costs), somehow creates an unmanageable "burden". In fiscal 1970, for instance, the Circuit Court of Cook County had revenue, mostly from fines, amounting to over $31 million, of which of $26 million came from the Municipal Department—the very court which processes all misdemeanor, quasi-criminal and traffic cases in Cook County and which convicted defendant.[44] It seems, indeed, that in many or possibly all juris-

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[43] California: Deering's Government Code §§ 72195, 69952; *In Re Henderson,* 61 Cal. 2d 541, 39 Cal. Rept. 373, 393 P.2d 685 (1964) ("disorderly conduct"); *Muller v. Municipal Ct.,* 259 C.A.2d 177, 66 Cal. Rept. 367 (1968) (parking); *Preston v. Municipal Ct.,* 188 C.A.2d 76, 10 Cal. Reptr. 301 (1961). New York: McKinney's Consol. Laws of N.Y. Ann., Vol. 66, §§ 756, 456; Vol. 29A, Part 3, N.Y.C. Criminal Court Act, §§ 40, 43, 91; Uniform District Court Act, §§ 2018, 2006; *People v. Freeman,* 44 Misc. 2d 1016, 255 N.Y.S.2d 563 (Seneca County Court 1965); *People v. Collins,* 38 Misc. 2d 952, 239 N.Y.S.2d 274 (Erie County Court 1963); *People v. Sporborg,* 57 Misc. 2d 140, 292 N.Y.S.2d 162 (1968) (Sup. Ct. App. Term). See also *Tate v. United States,* 123 U.S. App. D.C. 261, 359 F.2d 245 (1966).

[44] *Danaher Statistical Report, supra* at 1.

dictions, the courts actually do turn a profit,[45] thus possibly making them the only public service which is financially self-sustaining.

These facts clearly demonstrate that the "burden" argument is both fanciful in its fear and without basis in fact.

IV.

THE JUDICIAL SYSTEM AND SOCIETY WILL GREATLY BENEFIT IF ALL CONVICTED INDIGENTS ARE INSURED ACCESS TO THEIR TRIAL TRANSCRIPTS.

It has become commonplace to point out that the urban courts which "process" misdemeanor and penal ordinance violations do so in a manner which belies the grand phrases "Equal Justice under Law" and "Due Process of Law," and gives those phrases quite a different practical meaning.[46] As

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[45] In the District of Columbia, while $4.7 million was collected in revenue by the District's Court of General Sessions, which handles 97% of all its civil and criminal litigation, costs ran only $2.2 million. *D.C. Crime Commission, supra* at 283. The City of Oklahoma spent $217,675 for the general operation of its municipal courts in fiscal 1967-1968, while collecting $1,553,205 in fines and costs. Brief of Petitioner, at 43, Appendix B, *Williams v. Oklahoma City*, 395 U.S. 458 (1969).

[46] "An observer in the lower criminal courts ordinarily sees a trial bearing little resemblance to those carried out under traditional notions of due process . . . Rules of evidence are largely ignored. Speed is the watchword. Trials in misdemeanor cases may be over in a matter of 5, 10 or 15 minutes; they rarely last an hour even in relatively complicated cases. Traditional safeguards honored in felony cases lose their meaning in such proceedings; yet there is still the possibility of lengthy imprisonment or heavy fine.

* * * * *

"Observers have sometimes reported difficulty in determining what offense is being tried in a given case . . ." *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts* 30, 31 (Government Printing Office, Washington, D.C. 1967) [hereinafter "Task Force Report"].

Charles Evans Hughes said over 50 years ago in words that stand forcefully today:

> "The Supreme Court of the United States and the Court of Appeals will take care of themselves. Look after the courts of the poor, who stand most in need of justice. The security of the Republic will be found in the treatment of the poor and the ignorant; in indifference to their misery and helplessness lies disaster." Address by Charles E. Hughes, N.Y. State Bar Ass'n 42d Ann. Meeting, in *1919 Proceedings of the N.Y. State Bar Ass'n.* 224, 240-241.

And from the New York City Commissioner of Police, we hear:

> "Few citizens ever have contact with the higher courts. In the main, it is the police and the lower court Bench and Bar that convey the essence of our democracy to the people.
>
> "Justice, if it can be measured, must be measured by the experience the average citizen has with the police and the lower courts."[47]

The great danger is that Justice in our police and lower courts will be measured thinly in every case. The best, and universally available safeguard against this danger is the right to secure appellate review. But for the indigent without funds to buy a transcript, a meaningful review of the conduct of his trial is beyond reach. That this is so, and known to be so, creates "a license for arbitrary procedure". *Kent v. United States,* 383 U.S. 541, 553, 561 (1966). Overworked and harassed courts and prosecutors, conscious of

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[47]Patrick V. Murphy, "The Role of the Police in Our Modern Society," The Record of the Association of The Bar of The City of New York City, Vol. 26, No. 4, p. 292, 293 (April, 1971). After reviewing the conditions in our nation's lower criminal courts, the President's Commission on Law Enforcement and Administration of Justice was "shocked by what it has seen." *The Challenge of Crime in a Free Society,* 128 (U.S. Gov. Printing Office, Washington, D.C. 1967). See also *D.C. Crime Commission, supra* at 280-281.

the practical unavailability of review, will tend to lean away from due process rather than towards it.[48] On the other hand, the prospect of each convicted indigent having access to his transcript will go far toward insuring that no one suffers the sort of trial described by these Presidential Commissions and observable every day in courtrooms across the land. Indeed, in New York, the importance of available review is considered so great in these cases that a transcript is an *indispensable* part of the record on appeal, and all cases, including traffic cases, must be transcribed. *People v. Schenkel*, 256 N.Y. 539, 177 N.E. 131 (Ct. App. 1931); *People v. Newhart*, 235 N.Y.S. 2d 330 (Schuyler County Ct. 1962); *People v. Saalfield*, 14 N.Y. 2d 915, 252 N.Y.S. 2d 320, 200 N.E. 2d 862 (1964). As the New York Court of Appeals stated in *People v. Giles*, 152 N.Y. 136, 140, 46 N.E. 326, 328 (1897):

> "Our magistrates are invested with important powers. . . . Their determinations, in many instances, involve the liberties and property of citizens. To permit them to exercise these important powers without keeping any minutes or records of the testimony upon which their determinations can be reviewed, would be contrary to public policy, and would be investing them with autocratic powers greater than those possessed by any other officer of the government."

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[48]This tendency towards informality and disregard, a product of "unbridled discretion" in fact, has been described:

> "Other defects in the justice-of-the-peace courts arise from the lack of supervision and control of their activities. Questionable practices may often go unchecked.
>
> * * * * *
>
> "[F]or the most part the individual justice works below the threshold of judicial visibility. His acts are very often discretionary in nature and are seldom subject to judicial review . . . . Moreover, the failure to maintain adequate records for all justices . . . means that the entire system is likewise obscure in its outline and workings." *Task Force Report, supra* at 35.

See also *Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates*, Rules 2(d)(3) and 3(c)(2), 91 Sup. Ct. Rept'r, 4-5 (1971).

Members of this Court have echoed this concern:

> "[J]ustice demands an independent and objective assessment of a district judge's appraisal of his own conduct of a criminal trial." *Coppedge v. United States*, 369 U.S. 438, 455-456 (1962) (concurring opinion of Stewart, J.).

Thus it can be seen that providing a right to a free transcript to all indigent appellants, and not just to those convicted of felonies, will greatly improve the quality of justice far beyond those few who actually will avail themselves of their right. For the vast bulk of citizens caught in the criminal process, this country shall have taken another important step along the road to a fairer system of law.

CONCLUSION

Wherefore, defendant prays that the judgment of the Supreme Court of Illinois appealed from be reversed with instructions that defendant be afforded a transcript of his trial proceedings without costs to him for use on appeal, as would be provided under Illinois Supreme Court Rule 607(b) were he convicted of a felony, or, in the alternative, that his judgments of conviction be vacated and expunged.

Respectfully submitted,

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ADDITIONAL CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

A. THE CRIMES

1. CITY "DISORDERLY" ORDINANCE:

"A person commits disorderly conduct when he knowingly:

(a) Does any act in such unreasonable manner as to provoke, make or aid in making a breach of the peace."

"A person convicted of disorderly conduct shall be fined not less than $5.00 nor more than $500.00 for each offense." Municipal Code of Chicago, § 193-1a (1969)—Disorderly Conduct.

2. CITY "INTERFERRING" ORDINANCE:

"(a) Any person who knowingly shall resist or obstruct the performance by one known to the person to be a peace officer or any authorized act within his official capacity or shall knowingly interfere or prevent a peace officer from discharging his duty as such officer and whoever shall in any manner knowingly assist any person in the custody of any member of the police department to escape or attempt to escape from such custody, shall be fined not less than $25.00 nor more than $500.00.

"(b) For the purposes of this section 'resist' shall mean passive as well as active resistance." Municipal Code of Chicago § 11-33 (1969)—Interferring with a Peace Officer.

3. STATE "INTERFERRING" STATUTE:

"Resisting or Obstructing a Peace Officer. A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500.00 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both." 38 Ill. Rev. Stat. § 31-1.

4. STATE "DISORDERLY" STATUTE:

"Elements of the Offense.

"(a) A person commits disorderly conduct when he knowingly:

"(1) Does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace;

* * * * *

"(b) Penalty.

"A person convicted of a violation of subsection 26-1 (a) (1) or (a) (2) shall be fined not to exceed $500.00." 38 Ill. Rev. Stat. § 26-1 (Disorderly Conduct).

B. ILLINOIS CONSTITUTIONAL PROVISIONS

RIGHTS OF THE CITIZEN

Due Process:

"No person shall be deprived of life, liberty or property, without due process of law." Constitution of Illinois 1870, Article II, § 2.

Trial by Jury:

"The right of trial by jury as heretofore enjoyed, shall remain inviolate; but the trial of civil cases before justices of the peace by a jury of less than twelve men may be authorized by law." Constitution of Illinois 1870, Article II, § 5.

Trial by Jury:

"In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the

county or district in which the offense is alleged to have been committed." Constitution of Illinois 1870, Article II, § 9.

Right to a Remedy for a Wrong and to Free Justice:

"Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay." Constitution of Illinois 1870, Article II, § 19.

Right to Appeal:

"Appeals from the final judgments of Circuit Courts shall lie directly to the Supreme Court as a matter of right only (a) in cases involving revenue, (b) in cases involving a question arising under the Constitution of the United States or of this State, (c) in cases of habeas corpus, and (d) by the defendant from sentence in capital cases. Subject to law hereafter enacted, the Supreme Court has authority to provide by rule for appeal in other cases from the Circuit Courts directly to the Supreme Court." Constitution of Illinois 1870, Article VI, § 5.

"In all cases, other than those appealable directly to the Supreme Court, appeals from final judgments of a Circuit Court lie as a matter of right to the Appellate Court in the district in which the Circuit Court is located, except that after a trial on the merits in a criminal case no appeal shall lie from a judgment of acquittal. The Supreme Court shall provide by rule for expenditious and inexpensive appeals." Constitution of Illinois 1870, Article VI, § 7.

One Circuit Court:

"There shall be one Circuit Court for each judicial circuit which shall have such number of circuit and associate judges

and magistrates as may be prescribed by law; . . ." Constitution of Illinois 1870, Article VI, § 8.

"The Circuit Court shall have unlimited original jurisdiction of all justiciable matters, and such powers of review of administrative action as may be provided by law." Constitution of Illinois 1870, Article VI, § 9.

C. RULES OF THE ILLINOIS SUPREME COURT

ALTERNATIVES TO A TRANSCRIPT:

Rule 323(c): Procedure for a Settled Statement for Appeal:

"Procedure If No Verbatim Transcript Is Available. If no verbatim transcript of the evidence or proceedings is obtainable, the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. It shall be served within seven days after the notice of appeal is filed. Within 21 days after the notice of appeal is filed, any other party may serve proposed amendments or his proposed report of proceedings. Within seven days thereafter, the appellant shall, upon notice, present the proposed report or reports and any proposed amendments to the trial court for settlement and approval. The court, holding hearings if necessary, shall promptly settle, certify, and order filed an accurate report of proceedings." 110A Ill. Rev. Stat. § 323(c) (1969).

Rule 323(d): Agreed Statement of Facts (For Appeal):

"The parties by written stipulation may agree upon a statement of the facts material to the controversy and file it in lieu of and within the time for filing a report of proceedings." 110 Ill. Rev. Stat. § 323(d) (1969).

PROVISIONS FOR FREE TRANSCRIPTS

(See also Rule 607(b), *infra*, p. 2-3)

Rule 661(b): Report of Proceedings (Juvenile Cases):

"In all proceedings in which a minor is found to be a delinquent, the minor may petition the circuit court for a transcript of the adjudicatory and dispositional hearings. The petition shall be verified by the petitioner and shall state facts showing that he was at the time of his adjudication of delinquency, and is at the time of the filing of the petition, without financial means to pay for the transcript. If the judge who made the order of disposition, or in his absence any other judge of the court, finds that the minor is without the financial means to obtain a transcript of his hearings, he shall order the court reporter to transcribe an original and copy of his notes. The original of the transcript shall be certified by the reporter and filed with the clerk of the circuit court, and the copy shall be certified by the reporter and delivered to the minor without charge. The reporter who prepares a transcript pursuant to an order under this rule shall be paid the same fee for preparing the transcript as is provided by law for the compensation of reporters for preparing transcripts in other cases." 110A Ill. Rev. Stat. § 661(b) (1969).

Rule 651(c): Record for Indigents; Appointment of Counsel (Post-Conviction Proceedings):

"Upon the timely filing of a notice of appeal in a post-conviction proceeding, if the trial court determines that the petitioner is indigent, it shall order that a transcript of the record of the post-conviction proceedings, including a transcript of the evidence, if any, be prepared and filed with the Clerk of the Supreme Court and shall appoint counsel on appeal, both without cost to the petitioner." 110A Ill. Rev. Stat. § 651(c) (1970).

D. OTHER STATUTORY PROVISIONS

STATUTORY PROVISION FOR TRANSCRIPT OF TRIAL FOR POST-CONVICTION PROCEEDING:

"(2) Duties of reporters in proceedings arising under post-conviction hearing act. In any case arising under 'An Act to provide a remedy for persons convicted and imprisoned in the penitentiary, who assert that rights guaranteed to them by the Constitution of the United States or the State of Illinois, or both, have been denied, or violated, in proceedings in which they were convicted', approved August 4, 1949, in which the presiding judge has determined that the post-conviction petition is sufficient to require an answer, it shall be the duty of the official court reporter to transcribe, in whole or in part, his stenographic notes of the evidence introduced at the trial in which the petitioner was convicted, if instructed so to do by the State's Attorney or by the court.

"(3) The official court reporter shall transcribe and furnish an original and copy of the proceedings at the trial of any person sentenced to any imprisonment where, pursuant to Rule ____ of the Illinois Supreme Court, an order is or had been entered so requiring." 37 Ill. Rev. Stat. §163(f)(2) and (3).

STATUTORY PROVISION OF COURT REPORTER AND FEE:

"Means of reporting—Transcripts. The court reporter shall make a full reporting by means of stenographic hand or machine notes, or a combination thereof, of the evidence and such other proceedings in trials and judicial proceedings to which he is assigned by the chief judge, and the court reporter may use an electronic instrument as a supplementary device.

* * * * *

"The court reporter shall furnish forthwith one transcript of the evidence and proceedings in a trial or other judicial proceeding correctly made to any party to the trial or pro-

ceeding upon the request of such party of his attorney. Unless and until provided in a Uniform Schedule of Charges which may hereafter be provided by rule or order of the Supreme Court a court reporter may charge not to exceed 25¢ per 100 words for making transcripts of his notes. The fees for making transcripts shall be paid in the first instance by the party in which behalf such transcript is ordered and shall be taxed in the suit." 37 Ill. Rev. Stat. § 655 (1969).

STATUTORY PROVISION FOR "WORKING OFF" FINES IN ORDINANCE CASES:

"Punishment for violation of ordinance. In all actions for the violation of any municipal ordinance, . . . [t]he person upon whom any fine or penalty is imposed, upon the order of the court or magistrate before whom the conviction is had, may be committed to the county jail as provided in Section 11-3-2 or to any place provided by ordinance for the incarceration of offenders until the fine, penalty, and costs are fully paid. No imprisonment, however, shall exceed 6 months for any one offense.

"The corporate authorities may provide by ordinance that every committed person shall be required to work at whatever labor his strength permits, within and without the place of incarceration, not to exceed 10 hours each working day. The committed person shall be allowed, exclusive of his board, a credit of $5 for each day's work on account of the fine, penalty, and costs." 24 Ill. Rev. Stat. § 1-2-9.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 6061.

JACK L. MAYER,

Appellant,

vs.

THE CITY OF CHICAGO,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

BRIEF FOR THE APPELLEE.

ADDITIONAL QUESTIONS PRESENTED.

1. Whether the rule of *Griffin* v. *Illinois* should be extended to grant transcripts at public expense to indigents appealing cases involving no possibility of imprisonment.

2. Whether the rule of *Griffin* v. *Illinois* should be extended to indigent appeals from convictions of petty offenses.

3. Whether *Griffin* v. *Illinois*, 351 U. S. 12 (1956), should be reconsidered.

4. Whether appellant has proven his need for a complete transcript.

ILLINOIS SUPREME COURT RULE INVOLVED.

Effective July 1, 1971, Illinois Supreme Court Rule 607(b), cited in Appellant's Brief (pp. 2, 3), has been amended to read as follows:

"Rule 607. Appeals by Poor Persons.
(As amended July 1, 1971.)

"• • • • • •

"(b) *Report of Proceedings.* In any case in which the defendant is convicted *of an offense punishable by imprisonment for more than six months,* he may petition the court in which he was convicted for a report of proceedings at his trial. If the conduct on which *that case* is based was also the basis for a juvenile proceeding which was dismissed so *that case* could proceed, the defendant may include in his petition a request for a report of proceedings in the juvenile proceeding. The petition shall be verified by the petitioner and shall state facts showing that he was at the time of his conviction, and is at the time of filing the petition, without financial means to pay for the report. If the judge who imposed sentence, or in his absence any other judge of the court, finds that the defendant is without financial means with which to obtain the report of proceedings at his trial, he shall order the court reporter to transcribe an original and copy of his notes. The original of the report shall be certified by the reporter and filed with the clerk of the trial court as provided below, and the copy shall be certified by the reporter and delivered to the defendant without charge. The reporter who *prepares* a report of proceedings pursuant to an order under this rule shall be paid the same fee for preparing the transcript as is provided by law for the compensation of reporters for preparing transcripts in other cases." (Amendments emphasized.)

ADDITIONAL STATEMENT OF THE CASE.

Since the Appellant's Brief was filed, Illinois Supreme Court Rule 607(b) has been amended, effective July 1, 1971, so as to extend an indigent's right to a report of proceedings at public expense in appeals from felony convictions to appeals from convictions of any offense punishable by imprisonment for more than six months.

Inasmuch as the offenses of which the appellant was found guilty are both punishable by fine only, and not by imprisonment, the amendment does not have any effect on the appellant's personal situation with respect to a free transcript. The amendment does, however, have a bearing on the arguments advanced concerning appeals from convictions of the more serious misdemeanors.

SUMMARY OF ARGUMENT.

I.

This case presents the issue whether the rule enunciated by this Court in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), should be greatly enlarged in applicability. In *Griffin* this Court held that transcripts or other reports of trial proceedings should be supplied at public expense to indigents appealing felony convictions, insofar as such reports are necessary to the adequate presentation of their appeals. In *Williams* v. *Oklahoma City*, 395 U. S. 458 (1969), this Court extended the *Griffin* rule to an indigent appealing his conviction of a municipal ordinance violation for which he had been sentenced to imprisonment in jail for a term of 90 days. Now the instant appellant demands that the *Griffin* rule be extended to an indigent appealing his conviction of an ordinance violation which carries no possibility of imprisonment. Appellant demands that he be furnished at public expense a complete verbatim transcript, some 400 pages long, of his two-day jury trial.

Williams v. *Oklahoma City*, 395 U. S. 458 (1969), is not controlling in this case. Under Oklahoma law the filing of a "case made", or record of so much of the proceedings, including testimony, as is necessary to present the issues on review, was a condition precedent to filing an appeal. In *Williams* a transcript had already been written up; the trial judge had made a finding that Williams' appeal was not without merit and that Williams was unable to supply a substitute for the transcript. Yet the trial judge denied Williams use of the existing transcript, thus cutting off his right to appeal.

Illinois has no such requirement and the instant appel-

lant has already filed his appeal in the Illinois Supreme Court.

II.

All the authorities relied on by appellant in his demand, under the Constitution, for a free transcript on appeal, were appeals from sentences to imprisonment or death.

Universal experience in the administration of criminal justice supports the reasonableness of the distinction between offenses punishable by imprisonment or death and offenses punishable only by imposition of a fine. Petty offenses are customarily punished only by fines. The more serious offenses are punished by imprisonment; the most serious, by mandatory prison sentences, or death.

It is constitutionally permissible to hedge about trial and review of the more serious offenses with greater precautions and more elaborate aids for the defendant.

To classify which types of charges merit greater assistance for indigent defendants is a task for the legislative branch, which can investigate the matter fully and provide funds to implement its decision.

III.

Since there are many times as many misdemeanor and ordinance violation convictions as felony convictions, granting appellant's demand and extending the *Griffin* rule to indigent appeals of every conceivable offense, no matter how petty, would multiply its applicability many, many times. It would stimulate the filing of many more appeals, a sizable proportion of them no doubt frivolous. It would result in further congestion of the dockets of our already overloaded courts of review. It would be a sizable expense to the court systems of the states. Defending such appeals would be a problem, both in terms of money and manpower,

to the counties and municipalities, many of which are already in financial straits.

Consistency appears to require that, if *Griffin* is applicable to all indigent misdemeanor and ordinance violation defendants, then *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), would also be applicable to every offense, no matter how petty, and counsel would have to be supplied at public expense to indigents defending such charges, both on appeal and in all proceedings at the trial level.

Therefore, it is timely and appropriate for this Court to re-examine *Griffin* now. For *Griffin* was a 5 to 4 decision and, in the opinion of the four dissenting justices, the reasoning of the majority opinion was not compelling.

All the justices in *Griffin* agreed that a policy of supplying transcripts at public expense to indigents appealing felony convictions is desirable. But the four dissenting justices thought this should not be by constitutional compulsion, but is properly a state legislative judgment. The dissenters pointed out that 29 states already (in 1956) made such provision.

The majority held, however, that the Fourteenth Amendment required the states to afford destitute defendants "as adequate appellate review as defendants who have money enough to buy transcripts."

The dissenting opinions maintained that the equal protection and due process clauses of the Fourteenth Amendment do not impose upon the states a duty to lift the handicaps flowing from differences in economic circumstances that exist wholly apart from any state action. Indeed, it is impossible to equalize appellants as long as some defendants can afford better lawyers, better investigations and release on bail.

This Court has on numerous occasions seen fit to re-examine and disavow its prior decisions. The demand of

the instant appellant that *Griffin* be extended to every indigent appeal of every conceivable petty offense, with disastrous consequences to the court systems of the nation, presents this Court with a fitting occasion to re-examine the rationale of *Griffin*.

IV.

It is not improper for this Court to consider the practical impact upon the state court systems of granting appellant what he demands.

Supplying free transcripts at public expense to every indigent appealing a misdemeanor or ordinance violation conviction, no matter how petty, would logically require extension to every indigent defendant, no matter how petty the charge, of the right to free counsel at public expense, both on appeal and during all phases of proceedings at the trial level.

Experience has demonstrated that following the granting of free counsel and free transcripts to indigent appellants of felony convictions, the number of criminal appeals increased vastly. This has been an important factor contributing to the current crisis in the administration of criminal justice.

Mandatory review, especially of petty cases, is not essential to due process. Review of such cases could properly be made largely discretionary.

The practical dimensions of the problems that would be raised in the event appellant prevails are vastly underestimated in his brief.

Appellant's assertion that the great majority of nonfelony charges are disposed of without trial is misleading. The number of nonfelony cases is so vast that the fraction that goes to trial constitutes a legion of hundreds of thousands, indeed, millions.

In Chicago, there are at present 20 courtrooms devoted to the trial of nontraffic, nonfelony cases, and 20 more courtrooms to the trial of traffic cases. There are 11 more courtrooms of the Circuit Court of Cook County trying nonfelony cases in the suburbs of Chicago.

In the 1969-1970 court year, 354,315 hang-on traffic complaint cases were tried, an average of 71 hang-on complaint traffic cases tried in each of 20 traffic courtrooms each day. In the same year, the traffic court of Chicago tried 928,556 personal service complaint traffic cases, in which 496,293 resulted in findings of guilty.

248,207 nontraffic, nonfelony cases were processed in Chicago during the same court year, an average of 50 cases per day in each of 20 courtrooms.

It is estimated by an exhaustive American Bar Foundation study that about 5,000,000 persons are charged with non-traffic misdemeanors in the United States each year, and that of these, at least 25%, or 1,250,000, are indigent.

In Chicago there are about four times as many nontraffic ordinance violation cases as misdemeanor cases. Projecting Cook County proportions nationally results in the rough estimate of 20,000,000 non-traffic ordinance violation cases each year.

It is authoritatively estimated that 25 per cent or 1,250,000 of the misdemeanor defendants are indigent. At the modest average cost of $50 per case for services of attorneys and, where needed, investigations and expert witnesses, this case load would aggregate a total cost of $62,500,000 to defend. How many of the possibly 20,000,000 ordinance violation defendants are indigent is unknown.

Standards for determining indigency vary widely from state to state, from county to county within the same state, and within the same court. The judicial determination of indigency is often casual and merely approximate.

The sheer number of indigents who become involved in the criminal process necessarily plays a large part in determining whether ideals with respect to defense can be realized.

Although most nonfelony trials are brief, a substantial proportion are not. Even though only a small percentage of the estimated 1,250,000 nonfelony trials of indigents in the United States are of considerable length, that small proportion constitutes a sizable number.

Some nonfelony trials are very extensive. Transcripts in ordinance violation cases sometimes run into hundreds, even thousands of pages.

V.

The rule of *Griffin* v. *Illinois*, 351 U. S. 12 (1956), does not require the state to purchase a stenographer's transcript in every case where a defendant cannot buy it. Alternative methods of preparing a report of proceedings are permissible under *Griffin*. The rules of the Illinois Supreme Court provide for such less expensive alternatives. But the appellant has made no effort to use any of these alternatives. Thus, appellant has failed to prove his need for a complete free transcript.

VI.

The claim of indigency by this particular appellant is contradicted by the record and his own statement of facts. Contrary to his affidavit that he has an income of zero dollars, he is supported by his parents, whose circumstances are not disclosed. He does not state how much income he receives from his parents. His affidavit fails to mention his net worth. He is a student at New York University School of Medicine, yet he found the time during the school year to travel from New York to Chicago to

attend a demonstration. He journeyed to Chicago under the auspices of a medical aid group to assist, at least by a proffer of semi-skilled medical services, at a projected demonstration by S. D. S., a well known national protest organization, which is certainly able to raise money to pay for appellant's transcript. Most appellants, who are neither rich nor poor, have to pay for their transcripts with hard earned money. To provide an appellant with Mayer's resources with a 400-page transcript at public expense is ludicrous.

ARGUMENT.

I.

THE ORDER APPEALED FROM IS NOT IN CONFLICT WITH WILLIAMS v. OKLAHOMA CITY.

Appellant's contention (Appellant's Brief, pp. 19, 20) that the decision of this Court in *Williams* v. *City of Oklahoma City,* 395 U. S. 458 (1969), "controls this case" will not withstand careful examination. Although a cursory glance at this Court's language in the *Oklahoma City* case might create an impression of support, this Court was in fact there confronted with a distinctly different situation.

Under applicable Oklahoma law, there existed, as a condition precedent to the filing of an appeal to the Oklahoma Court of Criminal Appeals, the requirement that the appellant file either a transcript or a "case made". Okla. Stat. Ann., Title 22, § 1059 (1958), § 1060 (Supp. 1968). It appears that under Oklahoma practice, a transcript consists of proceedings of record in the trial court other than the evidence introduced, while a "case made" is a record, approved by the trial court, of so much of the proceedings, including the evidence, as is necessary to present the issues for review.

An Oklahoma "case made", it should be noted, is not necessarily a verbatim report of the testimony heard at the trial. As *Dobbs* v. *State,* 114 P. 358, 360 (Okla.; 1911), states:

> "While the stenographer's notes of the testimony constitute the most convenient means of preparing a case-made, yet they are not the only source from which a case-made may be prepared. Even when a case-

> made is prepared from the stenographer's notes of the testimony, it must still be approved by the judge who tried the case, and he is not bound by such notes, but must still see that the case-made speaks the truth, and he may correct such case-made from memory or from any source that may be satisfactory to him."

The Oklahoma statute made it mandatory that a criminal appellant file either a "case-made" or a transcript, as that term is understood in Oklahoma. Without one or the other, there could be no criminal appeal.

In *Williams* v. *City of Oklahoma City* (at 485, 459), the trial proceedings had in fact been stenographically transcribed pursuant to Oklahoma law. Okla. Stat. Ann., Title 11, § 798 (1959); Okla. Stat. Ann., Title 20, §§ 110-111 (1962). But the trial court had refused, in the absence of express statutory authority, to order that a copy be provided Williams. The trial court did this despite its own specific findings that Williams was indigent, that the grounds of his appeal were not without merit, and that neither Williams nor his appointed counsel could make up a transcript of the trial proceedings from memory. This ruling of the trial judge thus cut off Williams' possibility of appealing, despite an express state statutory provision that an appeal from any criminal judgment might be taken as a matter of right. In that situation, this Court held (at 460) that the decision of the Oklahoma Court of Criminal Appeals "wholly denies any right of appeal to this impoverished petitioner, but grants that right only to appellants from like convictions able to pay for the preparation of a 'case-made'." This Court ruled this was forbidden by the Fourteenth Amendment.

In Illinois there is no requirement that a report of proceedings be filed in order to perfect an appeal. Mayer has already docketed his appeal in the Illinois Supreme Court. The rules of that Court, as is explained below, set forth

alternative methods of presenting evidence on review. Appellant has not even attempted to utilize any of these alternative methods. Instead, he claims that the Fourteenth Amendment requires that he be furnished free a complete verbatim transcript of all the testimony at his trial and points to *Williams* v. *City of Oklahoma City* as the controlling authority.

The *Oklahoma City* case simply does not support the appellant's demand. Mayer's right to appeal has not been cut off. The Fourteenth Amendment requires only that he have as adequate a means of presenting the evidence necessary to decide the issue on appeal as nonindigents. The equal protection clause does not make it mandatory that an indigent's means of presenting the evidence be as convenient and as expensive as those of a person of unlimited means.

II.

ALL THE CONSTITUTIONAL AUTHORITIES CITED BY APPELLANT CONCERNED TRANSCRIPTS IN APPEALS FROM SENTENCES TO IMPRISONMENT. IN THE CASE AT BAR NO POSSIBILITY OF IMPRISONMENT IS INVOLVED. THIS IS A VALID BASIS FOR DISTINGUISHING APPELLANT FROM HIS AUTHORITIES.

All of the authorities relied on by appellant in his demand, under the Constitution, for a free transcript (Appellant's Brief, pp. 8, 9) were appeals involving sentences to the penitentiary, except *Williams* v. *Oklahoma City*, 395 U. S. 458 (1969), which had to do with a jail term.

In *Griffin* v. *Illinois*, 351 U. S. 12 (1956), the petitioners were convicted of armed robbery. In *Eskridge* v. *Washington*, 357 U. S. 214 (1958), the petitioner was convicted of murder and sentenced to life imprisonment. In *Burns* v. *Ohio*, 360 U. S. 252 (1959), the petitioner had been convicted of burglary and sentenced to life imprisonment.

Smith v. *Bennett,* 365 U. S. 708 (1961), was a habeas corpus proceeding brought by two indigent prisoners serving 10 year sentences in the penitentiary for burglary, and this Court (at 713) limited its holding therein to cases "involving indigent convicted prisoners." In *Douglas* v. *California,* 372 U. S. 353 (1963), the petitioners had been convicted of 13 felonies, including robbery, assault with a deadly weapon and assault with intent to commit murder, and had been given prison terms. The petitioners in *Draper* v. *Washington,* 372 U. S. 487 (1963), had been convicted of robbery and incarcerated in the penitentiary (at 491). *Lane* v. *Brown,* 372 U. S. 477 (1963), was a federal habeas corpus proceeding brought by a petitioner who had been convicted of murder and sentenced to death. In *Long* v. *District Court of Iowa,* 385 U. S. 192 (1966), the petitioner had been convicted of larceny and sentenced to five years in the penitentiary. In *Roberts* v. *LaVallee,* 389 U. S. 40 (1967), the petitioner had been convicted of robbery, larceny and assault and sentenced to 15-20 years in prison.

Thus, all of the authorities cited in Appellant's Brief (pp. 8, 9) on the fundamental issue of this case involved indigents convicted of felonies and sentenced either to the penitentiary or to death, with the exception of *Williams* v. *Oklahoma City,* 395 U. S. 458 (1969). In *Williams,* it is true, the defendant was convicted of drunken driving in violation of no more than a municipal ordinance, but for this he had been sentenced to 90 days in jail.

The instant appellant has been convicted of two municipal ordinance violations—disorderly conduct and interfering with a police officer in the discharge of his duties—and fined $250 for each offense. (A. 3, 4) Neither of the two ordinances (Sections 193-1a and 11-33, respectively, of the Municipal Code of Chicago, Illinois) provides for any imprisonment as a possible penalty. The maximum penalty under each ordinance is a fine of $500. (See Appellant's Brief, p. 1a.)

Under this Court's recent decision in *Tate* v. *Short,* 401 U. S. 395, 91 S. Ct. 668, 28 L. ed. 2d 130 (1971), which forbade imprisonment of an indigent to "work off" a fine he is unable to pay, solely because of his indigency, as that decision has been implemented by the Circuit Court of Cook County, Illinois, the chance of the instant appellant's being imprisoned for nonpayment of his fine is non-existent.

The whole practice of criminal law recognizes the difference between offenses punishable by imprisonment and those punishable only by imposition of a fine. Petty offenses are customarily punished only by fines. The most serious offenses are punished by mandatory prison sentences, if not by death.

Universal experience in the administration of criminal justice supports the reasonableness of this distinction and makes it the basis of valid classification, whereby trial and review for the more serious offenses are hedged about with greater precautions and more elaborate aids for the defendant.

The Supreme Court of Washington has noted in *Hendrix* v. *City of Seattle,* 76 Wash. 2d 142, 456 P. 2d 696, at 700 (1969), the continuing viability of this distinction. In discussing the analogous right to counsel in misdemeanor cases and in ordinance violation cases, it said:

> "Since the adoption of the sixth amendment, the Supreme Court of the United States has not, despite countless opportunities to do so, declared that one accused of a misdemeanor has a constitutional right to appointed counsel. See Junker, *The Right to Counsel in Misdemeanor Cases,* 43 Wash. L. Rev. 685 (1968). The traditional line drawn between felonies and lesser crimes has persisted from our colonial beginnings to the present time, and no authoritative decisions to the contrary have been presented to us which eradicate that distinction."

At least twice in recent years, this Court has denied certiorari in cases presenting the issue of an indigent's right to appointed counsel to defend against a misdemeanor charge. *Winters* v. *Beck,* 239 Ark. 1151, 397 S. W. 2d 364 (1966), *cert. denied,* 385 U. S. 907 (1966); *State* v. *DeJoseph,* 222 A. 2d (Conn.) 752 (1966), *cert. denied,* 385 U. S. 982 (1966).

Every civilized community of substantial size has the unfortunate, but inescapable need of establishing and maintaining special courts of limited jurisdiction designed to process lesser offenses expeditiously and economically. At the time of the adoption of the Constitution, this function was performed by justice of the peace courts. See *Marbury* v. *Madison,* 5 U. S. (1 Cranch) 137 (1803). Today their counterparts, the municipal police courts, perform the same function, which in fact constitutes the largest amount of judicial work in the nation.

Some misdemeanors are serious matters, but an untold number of ordinance violations, of a bewildering variety, are petty and many are of the utmost triviality. It may well be appropriate to supply indigents in serious misdemeanor cases with trial and appellate counsel and with appellate transcripts at public expense. But to classify types of charges meriting such aid for indigent defendants and to distinguish them from multitudinous petty offenses in which provision for such assistance is unnecessary and would be fatuous is beyond the proper scope and function of the judicial branch. It calls for legislative investigation, debate and judgment. The legislative branch is able not only to declare the duty, but to provide the funds to implement it.

It was in this manner that the Congress adopted the Criminal Justice Act of 1964, 18 U. S. C. § 3006 A, which directs the federal district courts to implement the "furnishing representation for defendants charged with felonies

or misdemeanors, *other than petty offenses* as defined in section 1 of this title." (Emphasis supplied.) Petty offenses are there defined as offenses punishable by less than 6 months imprisonment. In nonpetty offenses the statute provides indigent defendants not only with counsel, but also with transcripts, investigative services and expert witnesses if, in the court's judgment, such services are necessary to an adequate defense.

For these reasons the attempt of the instant appellant to stretch the rule of *Griffin* v. *Illinois* to encompass a case of ordinance violations, not punishable by imprisonment, should be denied.

III.

THE RATIONALE OF THIS COURT'S OPINION IN GRIFFIN v. ILLINOIS NEEDS RE-EXAMINATION.

In the vivid language of Appellant's Brief (p. 8), fifteen years ago, in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), this Court "fleshed out" the Fourteenth Amendment by holding (at 20) that "destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." Invoking the majority opinion in *Griffin* as a sacred axiom, the appellant invites the Court to add considerable excess avoirdupois on the Fourteenth Amendment by extending the *Griffin* principle to every conceivable petty offense.

Since this would involve multiplying the applicability of *Griffin* manyfold, with foreseeable potent effects on the appellate court systems of the country, and result in further congestion of the overloaded and slow moving dockets of our courts of review, and since all the authority there may be for this demand stems from *Griffin*, it would seem to be not amiss for this Court to re-examine the reasoning of its opinion in *Griffin*.

For *Griffin* was a 5 to 4 decision. Although the four dissenting justices all expressed (at 26, 27, 29) agreement with the desirability of the policy—as a matter of legislative decision—of supplying an indigent defendant with a free transcript "*in a case like this*" (emphasis supplied)—that is, an appeal from a felony conviction resulting in a penitentiary sentence—, they were not impressed with the reasoning whereby there became attached to this policy a federal constitutional compulsion binding on the states.

A common-sense note was sounded in the dissenting opinion written by Justice Burton and joined in by three other justices. His observation (at 28, 29) is still true:

> "Persons charged with crimes stand before the law with varying degrees of economic and social advantage. Some can afford better lawyers and better investigations of their cases. Some can afford bail, some cannot."

How, indeed, could criminal appellants be equalized in the sense of the majority opinion in *Griffin* v. *Illinois* unless all were required to be assigned their attorneys and investigators by random selection from a pool, unless the attorneys were all compensated at the same rate, and the investigators likewise, and unless bail was abolished and all accused either released on their own recognizance or all kept in jail?

To the wisdom of Justice Burton's statement the separate dissenting opinion of Mr. Justice Harlan (at 34) added the ungainsayable observation:

> "All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action.
>
> "The Court thus holds that, at least in this area of criminal appeals, the Equal Protection Clause imposes on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances. That holding produces the anomalous result that a constitutional admonition to the States to treat all per-

> sons equally means in this instance that Illinois must give to some what it requires others to pay for. . . . It may as accurately be said that the real issue in this case is not whether Illinois has discriminated but whether it has a duty to discriminate."

It is true that, on the authority of *Griffin,* appellant invokes due process as well as equal protection. (Appellant's Brief, pp. 26, 27). But, as appellant expresses it, due process in this context means it is unfair for appellant to be deprived of equal protection. And, in our view, the same comment is applicable to the treatment of the due process aspect of the *Griffin* case embodied in Justice Frankfurter's concurring opinion (at 20-26). The dissenting opinion of Mr. Justice Harlan (at 36-39) made that appraisal of the due process contention.

At the time of the adoption of the Fourteenth Amendment, it was of course not intended to rectify differences in economic circumstances existing wholly apart from any state action. Nor, even at the present time, do the vast majority of Americans, whether educated in the law or not, believe that the Fourteenth Amendment should be so interpreted.

The concern of the justices joining in the majority opinion in *Griffin* that indigents appealing felony convictions have the advantage of a report of proceedings adequate for the purpose was recognized as praiseworthy and was indeed shared by the four dissenting justices. At the time of the *Griffin* decision in 1956, 29 states, as Mr. Justice Harlan noted (at 38), already provided free transcripts to indigent appellants in felony cases, both capital and noncapital—as a matter of public generosity, by legislative fiat of the people's representatives.

When transcripts are allowed indigents, not by sweeping constitutional declarations, but by legislative grant, then priorities can be ordered and the extent of the grant can

be controlled by the public will. An expenditure of public funds, no matter how worthy the purpose, necessarily results in either curtailment of other public services or increased taxation. The decision as to how state moneys are to be disbursed properly belongs in the states.

Whether what the instant appellant seeks should be allowed, whether indigent appellants of misdemeanor and ordinance violation convictions, even in petty cases involving no possibility of imprisonment, should be given free transcripts, with the vast repercussions this would entail for the entire state appellate and even trial court systems of the nation—that is a decision for each state to make in the light of its own resources, needs and priorities. It appears unwise to mandate by constitutional decree transcripts in indigent appeals of any and every conviction, no matter how minor the offense.

This Court is the most self-critical of courts. More than ninety times in its history has this Court seen fit to re-examine its prior decision. Blaustein and Field, *"Overruling" Opinions in the Supreme Court*, 57 Mich. L. Rev. 151, at 162 (1958); Douglas, *Stare Decisis*, 49 Col. L. Rev. 735 (1949). Therefore, we respectfully suggest to the Court that the time has arrived to re-examine the reasoning of the majority opinion in *Griffin v. Illinois*, 351 U. S. 12 (1956). This is made imperative by the demand of the instant appellant that the rule of *Griffin* be canonized as a sacred axiom and mechanically extended to indigent appeals of convictions of every petty offense.

IV.

IF THE RULE CONTENDED FOR BY APPELLANT PREVAILS, IT WILL INEVITABLY RESULT IN A LARGE INCREASE IN THE NUMBER OF APPEALS, WITH ADVERSE EFFECTS ON THE COURT SYSTEMS.

It is not improper for this Court to consider the mundane consequences of its decisions. The appellee has no desire to conjure up a parade of nonexistent horribles. But certainly the appellant begs the question in stating (Appellant's Brief, p. 28) that "[i]t may be anticipated that the City will argue that defendant, and like-situated indigents, should be denied his Fourteenth Amendment right to a free transcript on appeal because to grant him his right might somehow irreparably burden the State fiscal system." The question is, Does defendant have such a right? And relevant to a determination of that problem is the welfare of society and of its governments and court systems.

In the work of deciding cases, the directive force of a principle may be exerted along the line of logical progression, along the line of historical development, along the line of the customs of the community or along the lines of justice, morals and social welfare. Cardozo, *The Nature of the Judicial Process* (1968 ed.), pp. 9, 30, 31. Although the great generalities of the Constitution have a content and significance that vary from age to age (Cardozo, *op. cit.*, p. 17), the development of constitutional principles is not necessarily in the direction of endless expansion.

The adverse effects of granting appellant what he seeks would include more than the cost of providing free transcripts to indigents appealing misdemeanor and ordinance violation convictions. If *Griffin* v. *Illinois*, 351 U. S. 12 (1956), is extended to every indigent appealing a misdemeanor or ordinance violation conviction, then it is conceivable that *Gideon* v. *Wainwright*, 372 U. S. 335 (1963),

might be construed to require that such defendants be furnished with free counsel, both on appeal and during all phases of proceedings at the trial level. As Justice Walter V. Schaefer of the Illinois Supreme Court observed more than a few years ago:

> "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, *Federalism and State Criminal Procedure,* 70 Harv. L. Rev. 1, 8 (1956).

It is not alarmism, but sober realism to anticipate that, if appellant's contention is upheld, a proliferation of appeals will result. The ruling appellant desires would constitute an open invitation to frivolous appeals and to unrestrained loquacity in trials. This would necessarily result in a great drain on the time of courts of review, acute personnel problems in appellate courts, and interference with and delay of other appeals, both of felonies and civil matters.

The extent to which appellate practice will probably be stimulated if appellant prevails can be gauged by the effect thereon of the enactment in 1964 of Section 121-13 of the Illinois Code of Criminal Procedure (Ill. Rev. Stat., 1965, ch. 38, § 121-13; now superseded by Illinois Supreme Court Rule 607, to the same effect). This requires the courts to appoint counsel and provide a trial transcript to indigent persons appealing felony convictions. Oaks and Lehman in their *A Criminal Justice System and the Indigent: A Study of Chicago and Cook County* (1968), pp. 147, 148, report that during the four year period preceding January 1, 1964, the Public Defender of Cook County had averaged only six appeals per year, but that in the two years immediately following, he had been appointed at the rate of about 150 appeals per year.

The effect of this flood of felony appeals on the appellate

court system of Illinois is only too clear. According to the *1968 Annual Report of the Administrative Office of the Illinois Courts* (p. 23), the First District of the Illinois Appellate Court, which hears only appeals from Cook County, had pending before it on January 1, 1968, 657 civil appeals and 465 criminal appeals. 520 new civil appeals and 383 new criminal appeals were filed during 1968. The court disposed of 483 civil appeals and 319 criminal appeals during 1968. At the end of the year the court had pending on its docket 696 civil cases and 535 criminal cases. This constituted an increase in the court's backlog during 1968 of 19 civil cases and 70 criminal cases.

As for time elapsed between the date of filing in the Appellate Court and the date of disposition, of the cases decided in 1968, the same report (p. 25) indicates that 61 civil cases and 34 criminal cases required less than six months, 101 civil cases and 69 criminal cases took between six months and a year, 156 civil cases and 82 criminal cases lasted between a year and a year and a half, 108 civil cases and 94 criminal cases took between a year and a half and two years, 75 civil cases and 77 criminal cases continued between two and three years, and 19 civil cases and 27 criminal cases remained before the Appellate Court for more than three years. There is no indication that this trend has been reversed or even abated.

Experience in the State of Washington has been similar. *Hendrix* v. *City of Seattle*, 76 Wash. 2d 142, 456 P. 2d 696, at 710 (1969), reports:

> "Since 1962, an enormous increase in appeals to the Supreme Court has taken place, a steadily increasing percentage of which is brought at public expense. Should this trend continue at the present rate under existing procedures, nearly all of this court's time and energy will be pre-empted by criminal cases to the exclusion of practically all others.

A footnote on the same page of the *Hendrix* opinion states:

> "The records of the Clerk of the Supreme Court show the following number of criminal appeals filed in the Supreme Court and the percentage of indigent appeals for the following years:

Year	Total Criminal Appeals	Indigent Appeals	Percentage* Increase-Decrease
1962	75	32	%42
1963	75	35	46
1964	101	49	48
1965	136	64	47
1966	164	79	48
1967	222	131	59
1968**	90	56	62

> * Percentage indigent of total appeals.
>
> ** For 6 months, January 1 through June 30, 1968."

This state of affairs has been described by Chief Justice Burger (57 A. B. A. J. 425 (1971)) as an important part of the breakdown of the American system of criminal justice:

> ". . . [T]he convicted persons are not punished promptly after conviction, because of delay in the appellate process.
>
> ". . . I have said nothing of civil justice—the resolution of cases between citizens or between citizens and government. This, unhappily, is becoming the stepchild of the law, as criminal justice once was. Most people with civil claims, including those in the middle economic echelons, who cannot afford the heavy costs of litigation and who cannot qualify for public or government-subsidized legal assistance, are forced to stand by in frustration and often in want, while they watch the passage of time eat up the value of their case."

This swelling of the criminal appellate practice has an adverse effect on the functioning of the entire court system.

With the development of highly integrated court systems under the close control of appellate courts, the extent of appellate review has been greatly expanded and increased in frequency. The appellate courts have developed into courts of comprehensive review for the authoritative determination of the law and, in many instances, of the facts as well. The process requires the declaration of the law with the utmost meticulousness so that trial courts can make it effective in ruling on motions and in instructing juries. The entire judicial system has become appellate minded. Frequently the trial judge is not much more than a trial examiner. This has produced a tremendous mass of judicial decison which in itself constitutes a formidable problem for both the judiciary and the bar. Green, *Jury Trial and Mr. Justice Black,* 65 Yale L. J. 482 *et seq.* (1965).

This has not resulted in an acceleration of the disposition of cases. Rather, the dockets in both trial and appellate courts in the increasing number of heavily populated areas are steadily becoming more crowded. More judges, both trial and appellate, are required. Then, more courts, both trial and appellate. Then, more trial procedures and more appellate procedures. Then more authoritative declarations by the appellate courts on points of procedural and substantive law, etc., etc. (*id.*)

This is all part and parcel of what competent observers consider the current overemphasis on appeals. Trial by record has marked disadvantages and grant of a full appeal does not necessarily achieve a more just result. As Leon Green wrote in *Jury Trial and Mr. Justice Black,* 65 Yale L. J. 482, at 487 (1957):

> "It is only with the utmost effort, if at all, that even the most able and patient appellate judge can bring a case back to life. And not only has the case lost its vitality, it has taken on new elements which may affect its disposition; new personalities; inadequate briefs, per-

haps; restatement and reinterpretation of the facts and the law; the wider administrative outlook from the appellate bench; and a multitude of what are thought of as purely incidental influences—subtle influences—which nevertheless take their toll. Passing on the merits of a close case at long range in time and distance and in a hushed environment is a delicate undertaking."

In this connection it is relevant that, as Justice Frankfurter observed in his concurring opinion in *Griffin* v. *Illinois,* 351 U. S. 12, at 21 (1956), criminal appeals are a relatively recent innovation. In England there was no appeal from a conviction until 1907. No criminal appeals were afforded in the federal courts for nearly a hundred years. Illinois, on the other hand, in the forefront of the States, established criminal appeal in 1827, as Mr. Justice Harlan noted in his dissent in *Griffin* (at 36). Ill. Rev. Stat. 1827, Crim. Code §§ 186, 187.

If the rule contended for by appellant prevails, it may result in forcing the states, in self-defense, to make their appellate jurisdiction largely discretionary.

Be that as it may, it seems unlikely that, with all the attendant problems of and burdens on the appellate process, 400 pages of typewritten record will necessarily assure a more adequate result than the two days of live jury trial that appellant has already had.

a. Appellants' Portrayal of the Practicalities of the Problem Is Highly Inaccurate. It Woefully Underestimates the Number of Nonfelony Trials and the Length and Complexity of a Sizable Proportion of Them.

(1) Appellant cites (Appellant's Brief, p. 29) the 1971 budgets of the Chicago Bureau of Sanitation ($45 million), the Chicago Fire Department ($72 million) and the Chicago Police Department ($210 million) in an effort to make it

appear that the cost of supplying free transcripts to indigents—$223,474 in all indigent felony appeals in Illinois in 1970—is inconsequential. Nothing is proven by such a forced, artificial comparison. The sanitation, police and fire fighting needs of Chicago are far more pervasive than the litigation expenses of indigent convicted felons appealing their convictions, and at least as important.

Although it is not of record, it seems worthwhile to mention that we have been informed by the Director of the Administrative Office of the Illinois Courts, Mr. Roy O. Gulley, that $325,000 is now being appropriated annually for payment to court reporters in preparing transcripts for indigent defendants in felony appeals. He also anticipates, that if free transcripts are granted indigents appealing misdemeanors, an additional 100 to 150 court reporters will be required in the state, at an additional cost of approximately $1,725,000 per year. Mr. Gulley further states that there is now a shortage of court reporters in Illinois and it might be impossible to obtain the services of an additional 100 court reporters for several years.

(2) That the library fees collected from civil litigants by the Circuit Court of Cook County, Illinois, in order to maintain a large, modern public metropolitan law library for the use of bench and bar, is only about twice the amount of the cost of supplying indigent Illinois felony appellants, as the Appellant's Brief states (p. 29), illustrates the magnitude of the cost of subsidizing such appeals.

(3) Another specious point made in Appellant's Brief (pp. 37, 38) is that it ill behooves the City of Chicago to argue against furnishing free transcripts to indigents when the judicial system there, the Circuit Court of Cook County, according to the *Statistical Report: Cases, Fees and Cost, 1967-1970,* prepared by Matthew Danaher, Clerk of the Circuit Court of Cook County, Illinois (hereinafter referred to as the Danaher Report), (p. 1), had in 1970 a total

revenue of over $31 million. The Danaher Report states that this amount was not only collected, but distributed—that is, paid over to Cook County and the City of Chicago for general county and municipal purposes. The same report (p. 1) also notes that the Criminal Division in 1970 had receipts of only $84,053. Certainly the expense of operating the Criminal Division was many times that amount. Whether the Circuit Court of Cook County is operated at a "profit" does not appear from the Danaher Report. Appellant's Brief (p. 38) states that in the Court of General Sessions of the District of Columbia, the expense of conducting that court during an unspecified period of time ran to only $2.2 million, while $4.7 million was collected by it in revenue. Appellant's Brief also states (p. 38) that the municipal court of Oklahoma City collected $1,553,205 in fines and costs, while expenses incurred by that court were only $217,675. That all this is irrelevant is proven by the appellant's observation (Appellant's Brief, p. 38) that the courts are possibly "the only public service which is financially self-sustaining." The courts' excess of income over expenses, where it occurs, is applied to maintain other public services, for which it is badly needed.

(4) Appellant's assertion (Appellant's Brief, p. 30) that the great majority of nonfelony charges is disposed of without trial, by forfeiture, plea or dismissal, is misleading. The number of nonfelony cases is so vast that the fraction that goes to trial constitutes a legion of hundreds of thousands, even millions.

For example, in Chicago there are at the present time 20 courtrooms devoted to the trial of nontraffic, nonfelony cases and 20 more courtrooms devoted to the trial of traffic cases. There are 11 more courtrooms in the Cook County suburbs. Thus, there are at present 51 branches of the Circuit Court of Cook County, Illinois, trying misdemeanor, ordinance violation and traffic cases.

Contrary to appellant's suggestion (Appellant's Brief, p. 32) that "the vast bulk of non-felony convictions" are traffic cases and that few traffic defendants, being owners of automobiles or employed drivers, could qualify as indigents, it should be remembered that the indigent appellant in the case on which appellant principally relies, *Williams* v. *Oklahoma City*, 395 U. S. 458 (1969), was appealing from a traffic conviction of drunken driving and that he was allowed to proceed as an indigent, although he owned an automobile.

According to the *Daily Municipal Court Record* (Chicago) of June 21, 1971, pp. 1, 3, in the First District (Chicago) of the Municipal Division of the Circuit Court of Cook County, there are 20 courtrooms in operation, trying traffic cases. Two of these are jury courtrooms. Trial calls are set for 9 a.m., 10:30 a.m., 1 p.m. and 2:30 p.m., in each courtroom, daily five days a week.

In the First District, the five following courtrooms of the Municipal Division (which is not empowered to try felonies) are located in the Criminal Court Building: mass arrest court, violence court, two narcotics courts, jury court. In the Central Police Headquarters in Chicago, there are four courtrooms devoted to the trial of non-felony cases: youth court, domestic relations court, women's court and central police court. There are also 11 outlying courtrooms at 8 different locations in Chicago. There are three youth courts, two auto theft courts, a paternity and nonsupport court, two misdemeanor courts and three branch police courts, one each on the north, south and west sides.

The 11 suburban courtrooms in Cook County are three courtrooms in the Second District (Evanston-Winnetka-Skokie), two courtrooms in the Third District (Niles-Harwood Heights), one courtroom in the Fourth District (Forest Park), two courtrooms in the Fifth District (Oak

Lawn-Worth) and two courtrooms in the Sixth District (Harvey-Blue Island).

It is impossible to conceive why all these courtrooms are required if, as appellant suggests (Appellant's Brief, p. 31), the "vast bulk" of the over one million nonfelony determinations in Chicago each year were merely forfeitures and mail-in fines.

The fact that even hang-on complaints (parking tickets) frequently result in trial is demonstrated by the Danaher Report (p. 12). This report reveals that in the 1969-70 court year, there were in the Municipal Department, First District, 2,833,325 "hang-on complaints". Of these, 1,287,207 pleaded guilty before court date, i.e., mailed in their fines. 1,317,363 failed to appear and summons issued. 329,939 were disposed of, on hearing, as not guilty. 24,376 were found guilty after trial.

Thus, 354,315 hang-on complaint traffic cases were actually tried in Chicago during the last court year. Distributed among 20 traffic courtrooms in Chicago, this would make an annual average of 17,716 such cases per courtroom. In a year of approximately 250 working court days, this constitutes an average of 71 hang-on complaint traffic cases tried and determined in each courtroom each day.

During the same year, the Chicago traffic courts processed 911,130 new personal service complaint cases. 369,315 of these defendants pleaded guilty and mailed in their fines before court date. 928,556 complaints (new and old) came up for court hearing. 496,293 were found guilty. 370,600 were disposed of as not guilty.

As for nontraffic ordinance violation complaints, the Danaher Report (p. 10) indicates that the First District (Chicago) of the Municipal Division of the Circuit Court of Cook County received during the last court year 42,857

criminal complaints (of which 2,863 were transferred to the Criminal Division), 222,855 quasi-criminal complaints and 19,999 complaints described as "preliminary". Leave to file the complaint was denied in 90,444 of these cases; 24,617 were stricken on leave to reinstate; 31,231 were nolle prossed, and 31,652 were dismissed for want of prosecution. 31,414 were discharged. 38,849 were found guilty. Of these 6,484 were placed on probation; 19,146 were fined; 10,933 were given terms in the House of Correction; 1,188 were sentenced to the County Jail; and 348 were sent to State institutions. Thus, during the 1969-70 court year, the 20 nontraffic, nonfelony courtrooms of the First Municipal District (Chicago) handled 248,207 cases. That comes to an annual average of 12,410 cases per courtroom. In a year of approximately 250 working court days, this constitutes an average of about 50 cases per day in each of the 20 courtrooms.

(5) How many misdemeanor and ordinance violation cases are tried in the United States each year?

The monumental American Bar Foundation study, Silverstein, *Defense of the Poor in Criminal Cases in American State Courts* (1965), Vol. 1, pp. 123-125, concludes that it is difficult to estimate the number of persons charged with misdemeanors in the United States each year. Only a few states publish reports on misdemeanors, and even these are lacking in uniformity because of differences in definitions and methods of reporting. Without counting motor vehicle offenses, the number of misdemeanors is very much larger than the number of felonies. The ratio ranges from about 4 times the number of felonies in Iowa to about 30 times the number in New Hampshire. On the basis of a projection from the 12 states then reporting misdemeanors, Silverstein estimated that, without counting defendants in motor vehicle cases, there were about 4,470,000 misdemeanor defendants in the United States

in 1962. Silverstein further estimated that in 1965, about 5,000,000 persons a year are charged with nontraffic misdemeanors in the state courts.

Silverstein's figures do not include municipal ordinance violation cases. However, in Cook County, Illinois, where the official figures until 1964 reported misdemeanors and ordinance violations separately, there were, in 1963, 44,463 misdemeanor cases and 163,472 ordinance violation cases. Oaks and Lehman, *A Criminal Justice System and the Indigent: A Study of Chicago and Cook County* (1968), p. 39. Thus, there were almost four times as many ordinance violation cases as misdemeanor cases in Cook County in 1963. In 1964, when misdemeanors and ordinance violations were reported together, there were 205,397 nontraffic misdemeanor and ordinance violation cases reported terminated, while during the same period 4,225 felony cases and 1,643,381 traffic cases were terminated. (*id.*, p. 36)

By projecting the Cook County figures—four times as many nontraffic ordinance violations as misdemeanors—upon Silverstein's estimate of 5,000,000 misdemeanors in the nation annually, we reach a rough approximation of 20,000,000 ordinance violation cases in the nation each year.

(6) What proportion of misdemeanor and ordinance violation defendants are indigent? Silverstein states (*op. cit.*, Vol. I, pp. 124, 125) that such figures are almost totally lacking.

Approximately 55% of accused felons in the Circuit Court of Cook County, Illinois, are sufficiently poor to qualify for representation by the public defender or court-appointed counsel. Oaks and Lehman, *A Criminal Justice System and the Indigent: A Study of Chicago and Cook County* (1968), pp. 84, 85.

Silverstein (*op. cit.*, Vol. I, pp. 124-125) believes that a considerably larger proportion of felony than of mis-

demeanor defendants are indigent. He states that it is impossible to estimate with accuracy what percentage of misdemeanor defendants are indigent, but is of the opinion that many defendants who cannot afford to retain an attorney in a felony case can do so when charged with a misdemeanor. Silverstein concludes with the conservative estimate that no more than 25% of misdemeanor defendants are indigent. If this figure is accurate, then there are about 1,250,000 indigent misdemeanor defendants in the United States each year.

If each of these 1,250,000 misdemeanor charges against indigents were defended by a public defender or court-assigned counsel at the very modest average cost of $50 per case to cover services of attorneys, investigators, expert witnesses, etc., the total cost would be $62,500,000 for all state courts.

How many of the 20,000,000 nontraffic ordinance violation defendants per year are indigent is anyone's guess.

(7) The answer to the threshold question, "What is an indigent?," is anything but clear. Statistical surveys and decisional law indicate that standards of indigency vary not only from state to state, but from county to county within a state, and within the same court. Stifler, *Determining the Financial Status of an Accused,* 54 Ill. Bar J. 868, at 880 (1966); Silverstein, *Defense of the Poor* (1965), Vol. 1, pp. 105-119.

The problem of evaluating the situation of an accused with limited means should be relevant to the occasion, to his defense needs in his particular case. Some of the factors which should be considered have been outlined by Judge Prettyman:

> "Under what financial circumstances is a person accused of crime entitled to legal service at no cost to himself? Of course a person with nothing in any way, shape or form is indigent. But suppose that, although

he has no ready cash, he has assets such as a car, a television set or a refrigerator. Suppose he has no readily convertible asset but has an equity in a home. Suppose he has in his pocket a hundred dollars but owns not another sou. Suppose he earns plenty but spends more and so is always in debt. Suppose he has nothing himself but has a wealthy father, a thrifty brother or a kindly employer or friend. Suppose he can make a satisfactory installment arrangement. Suppose he cannot pay a fee commensurate with the service needed but could pay a small proportion of it. Suppose his wife works and really supports the family and is willing, if need be, to shoulder the burden of his defense, even though for what reason no objective observer can discern." Prettyman, *Three Modern Problems in Criminal Law,* 18 Wash. & Lee L. Rev. 187, at 212 (1961).

See also Connally, *Problems in the Determination of Indigency for the Assignment of Counsel,* 1 Ga. S. B. J. 11, at 12, 13 (1964).

Those courts which are exacting in determining indigency will, according to Stifler, *Determining the Financial Status of an Accused,* 54 Ill. Bar J. 868, at 870, 871 (1966), consider most, if not all, of the following factors: (1) real property the accused might own; (2) personal property; (3) employment; (4) pensions, social security, and unemployment compensation; (5) number of dependents; (6) outstanding debts; (7) seriousness of the charge; (8) whether the accused has been able to make bail; and (9) financial resources of relatives.

But the determination of indigency is very often a casual proceeding. As described by Dowling and Yantis, *Defense of the Poor in Criminal Cases in Illinois,* 47 Chi. B. Rec. 216, 219 (1966), in Cook County, Illinois, it usually consists of two questions in open court asked by the judge: "Do you have a lawyer?" And, if not, "Do you have funds with which to hire a lawyer?" The prevailing

attitude of Illinois judges toward the determination of indigency is reflected in the usual practice. If the defendant has not made bail by the time of arraignment, and if he says he is unable to hire a lawyer and wants one, then the court assumes that the defendant is indigent and appoints counsel for him. It is assumed that if the defendant were financially able, he would most probably have secured his release on bail and have retained his own attorney.

Oaks and Lehman, *A Criminal Justice System and the Indigent: A Study of Chicago and Cook County* (1968), p. 82, summarizes the situation thus:

> "It is, however, far from clear when counsel or other assistance must be supplied, what the requirement of counsel includes, or, for that matter, what indigence means. These are policy questions that must be answered at least in part in terms of social realities and social purposes such as the sheer number of indigents who become involved with the criminal process.
>
> "The number of persons who become involved with the criminal process will play a large part in determining whether our ideals with respect to adequate defense can be realized. Any increase in the scope of protection will place pressure upon society generally in terms of costs and on the bar in particular in terms of manpower. The stiffer these pressures are, the more likely they are to be resisted."

(8) One more misconception of appellant to be corrected is the argument (Appellant's Brief, p. 30) that "since most nonfelony trials are very short in duration, those transcripts that are required on appeal are not lengthy."

Although the great majority of nonfelony trials are brief, a substantial proportion are not. Even if only a small proportion of the conservatively estimated 1,250,000 nonfelony trials of indigents throughout the United States each year are of considerable length, that small proportion constitutes a very sizable number.

That nonfelony trials can be extensive is illustrated by the instant appeal. Here a simple incident during a demonstration that broke down into violence, an incident lasting but a moment, resulted in a two-day jury trial, the 400-page record of which will cost some $300 to transcribe (Appellant's Brief, pp. 4, 7).

Earlier this year this Court denied certiorari (..... U. S. .....) in the case of *City of Chicago* v. *Staughton Lynd, et al.*, 47 Ill. 2d 205 (1971). Like the instant matter, the *Lynd* case involved merely a charge of interfering with a police officer in the performance of his duties, a municipal ordinance violation. Yet the transcript of testimony ran to 643 pages. At the present time, the City of Chicago is the appellee in a municipal ordinance violation case pending in the Illinois Supreme Court entitled *City of Chicago* v. *Peter Weiss, et al.*, No. 42487. The trial of this disorderly conduct case, though without a jury, lasted 6 weeks and precipitated a transcript 6,029 pages in length.

b. Indigents' Rights to Free Transcripts in Appeals of Petty Offenses in California, New York and in Other Places Are Much Less Extensive Than in Appellant's Account Thereof.

Appellant's argument (Appellant's Brief, pp. 36, 37) from his claim that several states "already grant free transcripts to all indigent defendants regardless of the nature of the offense of which they are convicted" requires comment in some detail.

(1) The appellee agrees that to furnish to genuine indigents some form of a report of proceedings sufficient to present adequately their points on appeal from convictions for felonies and serious misdemeanors involving imprisonment is a desirable policy if the legislature sees fit to authorize it.

(2) The appellee denies that, if some states do furnish free transcripts to indigents appealing lesser convictions, this creates a constitutional obligation on all the other states to do the same.

(3) Appellant has made no attempt to prove that this alleged practice in some other states has not in fact created an undue public expense and that it has not burdened the courts of review in those states.

(4) The situation with respect to lesser offenses is quite different in California and New York, the two principal states cited by appellant in this connection, from that in Illinois.

In California, municipal ordinance violations are deemed criminal in nature and are prosecuted in the name of the People. *People* v. *Pacific Gas and Electric Co.*, 168 Cal. 496, 143 P. 727, 728 (1914); *In re Clark*, 24 Cal. App. 389, 141 P. 831, 832 (1914); 35 *Cal. Jur.* 2d, Municipal Corporations, § 420. New York also considers a municipal ordinance violation a misdemeanor. 52 McKinney's Consol. Laws of N. Y. Anno., Second Class Cities Law, § 42; 40 *N. Y. Jur.*, Municipal Corporations, § 749.

In Illinois, municipal ordinance violations are distinguished from misdemeanors, which are violations of state statute, but not punishable by imprisonment in the penitentiary. Municipal ordinance violations are in Illinois denominated quasi-criminal in nature, but procedurally are treated as civil actions. *Village of Maywood* v. *Houston*, 10 Ill. 2d 117 (1957); *Village of Park Forest* v. *Bragg*, 38 Ill. 2d 225 (1967). Such a category of quasi-criminal actions has never been held by this Court to be improper.

California does not grant free transcripts to indigents in civil cases. California: Deering's Government Code, 69953. Neither does New York.

(5) Of the three California cases appellant cites (Appellant's Brief, p. 37) as granting free transcripts to indigents in municipal ordinance appeals, two concern appeals from convictions under state criminal statutes. *In re Henderson,* 61 Cal. 2d 541, 543, 393 P. 2d 685 (1964); *Preston* v. *Municipal Court,* 188 Cal. App. 2d 76 (1961). Only one of the California cases cited by appellant deals with a free transcript in an appeal from a municipal ordinance violation conviction. This is *Muller* v. *Municipal Court,* 259 Cal. App. 2d 177 (1968), in which the defendant had accumulated seven parking tickets. The court called these violations "misdemeanor parking violations" and stated (at 178), "In misdemeanor cases, . . . a transcript is furnished only to an appellant who is indigent and only when a transcript is necessary to an adequate and effective appellate review." Thereupon, the court denied Muller a free transcript because he had made no attempt to secure a settled statement of facts.

The instant appellant has not cited any California decision granting a free transcript to one convicted of a municipal ordinance violation.

(6) Furthermore, California strictly limits the giving of free transcripts to indigents appealing misdemeanor convictions by requiring the appellant to prove to the trial court that a settled statement of facts would be inadequate for appellate review. *People* v. *Goudeau,* 8 Cal. App. 3rd 275 (1970); Cal. Rules of Ct., Rules 184, 187.

(7) The most important New York statute the appellant cites (Appellant's Brief, p. 37) appears to be McKinney's Consolidated Laws of New York, Anno., Vol. 66, § 456 (1970-71 Supp.). The other New York statutory provisions cited serve only to embellish Section 456, which provides that "[i]n any case where the defendant is convicted of a crime or where after conviction defendant's

coram nobis application to vacate the judgment is denied or dismissed after a hearing at which testimony has been taken," two days after notice of appeal is filed, the clerk shall notify the "stenographer" thereof, and within 20 days thereafter the stenographer shall file, with the clerk two copies of a transcript of the stenographic minutes of the entire proceedings. The statute provides that the expense of the transcripts shall be a county or city charge, as the case may be, payable to the stenographer out of the court fund. The statute then states:

> "2. Upon the order of the trial judge or upon the order of any appellate court or judge and *upon such conditions as such trial judge or such appellate court or judge thereof may impose,* the clerk *without charge* shall furnish one of said transcripts to the defendant or his counsel." (Emphasis supplied.)

This section probably applies to appeals from municipal ordinance convictions, since Section 456 applies to all criminal cases and New York considers a municipal ordinance violation a misdemeanor.

However, none of the New York decisions cited in Appellant's Brief (p. 37) holds that one convicted of a municipal ordinance violation has a right to a free transcript; each of the cases he mentions involves violation of a state statute. *People* v. *Freeman*, 255 N. Y. S. 2d 563 (Seneca County Ct., 1965); *People* v. *Collins*, 239 N. Y. S. 2d 274 (Erie County Ct., 1963); *People* v. *Sporborg*, 292 N. Y. S. 2d 162 (Sup. Ct., App. Term., 1968).

It is noteworthy that Section 40 of the N. Y. C. Criminal Court Act states that misdemeanor trials will be conducted without juries. New York also allows appeals without a transcript. 66 McKinney's Consol. Laws of N. Y., Code of Criminal Procedure § 751; *People* v. *Giles*, 152 N. Y. 136, 140, 46 N. E. 326, 328 (1897).

(8) The final case cited in Appellant's Brief (p. 37) in this connection—*Tate* v. *United States,* App. D. C., 1966, 359 F. 2d 245 (1966)—dealt with the right to a transcript in an appeal from a conviction of possession of narcotics, not from conviction of a municipal ordinance violation. It is without relevance to the problem at hand.

(9) It seems significant in this connection that this Court in 1965 declined to review a decision of the Ohio Supreme Court which held that one convicted of an ordinance violation does not have a constitutional right to a free transcript on appeal. *Toledo* v. *Smith,* 3 Ohio St. 2d 80, 32 Ohio Ops. 2d 57, 209 N. E. 2d 410, cert. den. 383 U. S. 949, 16 L. Ed. 2d 211, 86 S. Ct. 1206 (1965). In *Toledo* v. *Smith,* the defendant was found guilty of being drunk and disorderly and resisting arrest. The defendant claimed he had a right to a bill of exceptions including a complete transcript at public expense because he was indigent. The trial court held that a narrative and not a stenographic report would be sufficient. In holding that the defendant had no right to a transcript at public expense, the Ohio Supreme Court reasoned that providing free transcripts would waste public funds on frivolous appeals. This Court denied certiorari without comment. 383 U. S. 949, 16 L. Ed. 2d 211, 86 S. C. T. 1206.

See also *Wright* v. *Crawford,* 401 S. W. 2d 47, 49 (Ky. App. 1966).

V.

APPELLANT HAS FAILED TO PROVE HIS NEED FOR A COMPLETE FREE TRANSCRIPT.

Appellant admits (Appellant's Brief, pp. 13, 14) that the rule of *Griffin* v. *Illinois,* 351 U. S. 12 (1956), does not require a State to "purchase a stenographer's transcript in every case where a defendant cannot buy it." As this Court there stated (at p. 20):

> "The Supreme Court [of Illinois] may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in cases [citing cases]. The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and of appellate practice. [Citations.] We are confident that the State will provide corrective rules to meet the problem which this case lays bare."

The concurring opinion of Mr. Justice Frankfurter in *Griffin* further observed (at p. 24):

> ". . . But in order to avoid or minimize abuse and waste, a state may appropriately hedge about the opportunity to prove a conviction wrong. When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process.
>
> ". . . It is not for us to tell Illinois what means are open to the indigent and must be chosen. Illinois may prescribe any means that are within the wide area of its constitutional discretion."

These considerations were amplified and particularized by this Court in *Draper* v. *Washington,* 372 U. S. 487, at 495, 496 (1963). We ask the Court's indulgence in our quoting from this discussion at some length:

> ". . . [W]e reaffirm the principle, declared by this Court in *Griffin,* that a State need not purchase a stenographer's transcript in every case where a defendant cannot buy it. 351 U. S. at 20. Alternate methods of reporting trial proceedings are permissible

if they place before the appellate court an equivalent report of events at the trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript. Moreover, all or part of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances. . . . If the assignments of error go only to rulings on evidence or to its sufficiency, the transcript provided might well be limited to the portions relevant to such issues. Even as to this kind of issue, however, it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted. In the examples given, the fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review. In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds—the State must provide the defendant with the means of presenting his contentions to the appellate court which are as good as those available to a non-indigent defendant with similar contentions."

Appellant admits (Appellant's Brief, pp. 13, 14) that this is the law. But, unlike Mr. Justice Frankfurter, he attempts (Appellant's Brief, pp. 14-17) to minimize Illinois' right to prescribe the means of appellate review.

The Illinois Supreme Court has exercised its broad powers to provide means of affording adequate and effective appellate review to indigent defendants other than a

complete verbatim transcript. Rule 323 (c) of the Rules of the Illinois Supreme Court, as revised effective July 1, 1971, provides:

> "... If no verbatim transcript of the evidence of proceedings is obtainable the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. It shall be served within 14 days after the notice of appeal is filed. Within 28 days after the notice of appeal is filed, any other party may serve proposed amendments or his proposed report of proceedings. Within 7 days thereafter, the appellant shall, upon notice, present the proposed report or reports and any proposed amendments to the trial court for settlement and approval. The court, holding hearings if necessary, shall promptly settle, certify and order filed an accurate report of proceedings. ..."

The appellant has made no attempt to proceed in this alternative fashion. There is nothing in the record or in Appellant's Brief intimating that the appellant has sought to draft, as suggested by this Court's opinion in *Draper* v. *Washington*, 372 U. S. 487, at 495 (1963), "a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes."

Another alternative is afforded by Illinois Supreme Court Rule 323 (d), which permits the parties by written stipulation to "agree upon a statement of facts material to the controversy and file it in lieu of and within the time for filing a report of proceedings". Appellant has made no attempt to work out an agreed statement of facts.

One of appellant's points on his appeal of his conviction (Appellant's Brief, p. 11) is his defense of "necessity". He claims that his admitted interference with the action of police, during a riot, while they were removing an injured person from a city street, was necessary, because he, a

medical student possessing some medical knowledge, surmised that doing so might result in more serious damage to the injured person. Surely a 400-page transcript (estimated, per Appellant's Brief (p. 9), to cost approximately $300 at 75¢ per page) is not required to present the simple point that the trial court erred in declining to give an instruction setting forth appellant's theory.

Another of appellant's contentions in his principal appeal (Appellant's Brief, p. 11) is that the prosecutor indulged in a sustained course of prejudicial misconduct. It would have been a simple matter for appellant's counsel, with the assistance of the court reporter, to pinpoint among the court reporter's untranscribed notes, those statements and actions of the prosecutor he considers prejudicial. The record and Appellant's Brief fail to indicate that this has been attempted.

Still another contention of the appellant in his principal appeal is that the evidence was insufficient to sustain his conviction. (Appellant's Brief, p. 12) But this Court specifically stated in *Draper* v. *Washington*, 372 U. S. 487, at 496 (1963), that if the assignments of error go to rulings on evidence or to its sufficiency, the transcript provided can be limited to the portions relevant to such issues and that "it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted." Appellants who have to pay for their transcripts usually do this. But the instant appellant has made no such attempt.

To sum up, appellant has not complied with the actual tenor of *Griffin* v. *Illinois* and *Draper* v. *Washington*. Assuming *arguendo* that these authorities are applicable to his case, he demands more than he would be entitled to under them. By asking too much and doing too little to

help himself, appellant has deprived the Illinois Supreme Court of a fair opportunity to vindicate his constitutional rights.

VI.

THE MECHANICAL JURISPRUDENCE OF "INDIGENCY" APPELLANT HERE EXPLOITS IS PATENTLY UNREALISTIC.

Appellant's affidavit of indigency (App. 26, 27) alleges that "[i]n the year preceding this application my income was $0.00", although it also states he is a medical student at the New York University School of Medicine, and "I have no other means of subsistence other than my parents who pay for my tuition and a New York State Regents Incentive Scholarship." The affidavit fails to indicate the economic status of his parents or how much they disburse to him. It also fails to deny the existence of bank accounts, investments, property, real and personal. The affidavit does not show his net worth.

In October, 1969, (App. 1)—that is, during the school year,—appellant found the time and the means to come from New York to Chicago in order to be a "'medical presence' (providing first aid assistance)" at a S. D. S. demonstration. (Appellant's Brief, p. 12.) He did this "under the aegis of the 'Medical Committee for Human Rights', a national organization of doctors and medical students devoted to humanitarian causes." (*id.*) He did this despite the fact that there are quite a few physicians in Chicago.

After his arrest, appellant certainly had a moral claim upon the Medical Committee for Human Rights and upon S. D. S. to aid him with his defense. S. D. S. is a nationally known protest organization. Certainly raising $300.00 to pay for appellant's transcript would be no great task for S. D. S.

At the trial, in the Illinois Supreme Court and in this Court, appellant has been and is represented without charge by the same able and zealous counsel. (Appellant's Brief, p. 5.)

Therefore, the disquisition in Appellant's Brief (p. 6) upon the "invidious discrimination" visited upon this appellant by the failure of the State to provide him with a trial transcript is distinctly artificial.

Appellant's argument sentimentalizes and falsifies the whole problem presented by this appeal. It dichotomizes the population into rich and poor, with no one in between. (See, for example, Appellant's Brief, p. 7.) Of course, in the real world, incomes cover a very broad range. Most persons have to earn their not abundant bread by labor more or less onerous. The working class—blue and white collar—makes up the majority. Most people would have to skimp, might even find it crippling, to pay for an extensive trial transcript. Yet appellant's argument lumps the working majority with the rich, who can purchase a transcript with ease.

In appellant's argument, any one who is willing to sign a *pro forma* affidavit of indigency automatically becomes an "indigent by definition" and thereby entitled, under the equal protection clause, to as good an appeal as a rich man. The result is a deprivation of equal protection to the working majority, who, when they appeal, must purchase their transcripts and legal service with hard earned money.

In any event, the claim of indigency by this particular appellant is contradicted by the fair implications from the record and from his own statement of facts (App. 26, 27; Appellant's Brief, p. 12). To provide a defendant with Mayer's resources with a 400-page transcript at public expense is ludicrous.

CONCLUSION.

The order of Illinois Supreme Court, denying appellant a free transcript for use in his appeal before that court, should be affirmed in its entirety.

Respectfully submitted,

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July 28, 1971.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 6061

JACK L. MAYER,

Appellant,

vs.

THE CITY OF CHICAGO,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF OF STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS AMCUS CURIAE

INTEREST OF THE STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS FILING IN AMICUS CURIAE

The Office of Edward V. Hanrahan, State's Attorney of Cook County, Illinois is submitting the instant *amicus curiae* brief pursuant to the written consent of both parties to this cause. Said brief has been prepared and submitted for the following reasons.

If this Honorable Court requires that the petitioner is entitled to a free transcript, the expense of providing said transcript might have to be undertaken by the Circuit Court of Cook County, whom the Office of the State's Attorney of Cook County represents.

Furthermore, there are eight misdemeanors included under the provisions of the Illinois Criminal Code (Ill. Rev. Stats., Chap. 38 (1969) which provide a fine as the only possible penalty (See Appendix). Since the instant cause will obviously affect the question of free transcripts for defendants convicted of said charges, the State's Attorney of Cook County, entrusted with the responsibility of prosecuting violations of the Illinois Criminal Code within Cook County, wishes to present the instant brief in support of the position taken by the City of Chicago in the present cause.

We would like to acknowledge the assistance in the preparation of this brief of Daniel Pierce, a third year law student at De Paul University, Chicago.

SUMMARY OF ARGUMENT

I.

In *Griffin* v. *Illinois,* 351 U.S. 12 (1956) this Court held that an indigent defendant who has been convicted of a felony charge is entitled to a free transcript for purposes of an appeal. However, this Court also made it clear that a verbatim transcript is not the only method whereby evidence can be presented to an appellate court for review. For example, the use can be made of a bill of exceptions, a method long approved by Illinois and other jurisdictions. Said bill of exceptions can be prepared from the notes of the court, of counsel, or anyone else who was present during the trial. In addition, Illinois Supreme Court has permitted the use on appeal of methods other than a verbatim transcript in Supreme Court Rules 323 (c) and (d).

However, petitioner chose not to avail himself of any of these procedures, contending, instead, that these methods were inadequate. However, since the alternate Illinois procedures have not been shown to be inadequate, petitioner is now estopped from contending that he has a constitutional right to a verbatim transcript.

II.

Williams v. *Oklahoma City,* 395 U.S. 458 (1969) is not controlling, as alleged by the petitioner. Although *Williams* is similar to the instant case in that it also involved the question of the right to a free transcript by an indigent defendant, the other facts presented there are essentially different. Under Oklahoma law, a criminal appellant had to purchase a "case-made," or verbatim transcript, before he was permitted to appeal to the

Oklahoma Court of Criminal Appeals. This Court held that it was a denial of equal protection to preclude an indigent defendant from appealing merely because he was unable to purchase a "case-made," which was the only way to present the evidence of the trial to the reviewing court.

However, in Illinois there are alternative methods to the preparation of a verbatim transcript in which to present an appeal, making this case patently distinguishable from *Williams*.

In addition, the defendant in *Williams* received a 90 day jail sentence, while the instant petitioner received, and indeed could only have received, a fine. As will be noted in Point III, there has been no intent shown by this Court to extend any of the related constitutional rights to defendants convicted of offenses providing for only a fine as a penalty, thereby implying a similar intent regarding free transcripts.

III.

The question of the extent to which constitutional rights are to be applied is often answered in light of the practical considerations facing this Court. For example, although the right to a trial by jury has always been considered as fundamental to the American system of justice, that right has been limited to other than "petty" offenses. The basis for this limitation has been that the need for efficient and speedy adjudication outweigh any benefits which might accrue to defendants accused of petty offenses and who wish jury trials.

Similarly, this Court has impliedly determined that the right to counsel guaranteed in felony trials in *Gideon* v.

Wainwright, 372 U.S. 355, is not to be extended to petty offenses, for this Court has, on at least three occasions, denied certiorari in cases where the question of the right to free counsel to indigent misdemeanants has been raised. In addition, in issuing its recent Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, this Court has not included the right to counsel to indigent defendants in trials involving petty offenses.

The limitations placed on both the right to trial by jury and the right to counsel are grounded on a realization of the practical problems facing the bench with its overcrowded dockets and the bar with inadequate manpower. Taking the same practical approach with the instant question leads to the conclusion that the right of an indigent defendant to a free transcript must be limited to cases where said defendant has been convicted of other than a "petty" offense.

ARGUMENT

I.

SINCE THE PETITIONER MADE NO EFFORT TO UTILIZE ANY OTHER AVAILABLE MEANS TO AFFORD HIM APPELLATE REVIEW, HE IS NOW ESTOPPED FROM CONTENDING THAT THE FAILURE TO PROVIDE HIM A FREE TRANSCRIPT VIOLATED HIS CONSTITUTIONAL RIGHTS.

In the landmark decision of *Griffin* v. *Illinois,* 351 U.S. 12 (1956), your Honors ruled that if a State provides an avenue of appellate review it must also provide a free transcript to any indigent appealing a felony conviction. However, Mr. Justice Black, writing the majority opinion, clearly indicated that a transcript need not be provided in every indigent appeal:

> "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bill of exceptions or other metheods of reporting trial proceedings could be used in some cases (Illinois cases cited.)." 351 U.S. at 20. (Cf. *Smith* v. *Bennett,* 365 U.S. 708, 710 (1961); *Eskridge* v. *Washington Board of Prison Terms and Paroles,* 357 U.S. 214, 216 (1958); *Johnson* v. *United States,* 353 U.S. 565, 566 (1957).

It is important to note that not only has a long line of cases in Illinois approved the use of bills of exceptions without an accompanying transcript (See dissenting opinion of Mr. Justice Harlan in *Griffin, supra* at page 31), but the use of said method of review has long been historically approved. As was noted by Mr. Justice

White, with whom Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Stewart joined, dissenting, in *Draper* v. *Washington,* 372 U.S. 487, at 502, citing *Miller* v. *United States,* 317 U.S. 192, 198 (1942):

> "Historically a bill of exceptions does not embody a verbatim transcript of the evidence but, on the contrary, a statement with respect to the evidence adequate to present the contentions made in the appellate court. Such a bill may be prepared from notes kept by counsel, from the judge's notes, from the recollection of witnesses as to what occurred at trial, and, in short, from any and all sources which will contribute to a veracious account of the trial judge's action and the basis on which his ruling was invoked."

Further, it is important to observe that the Illinois Supreme Court has acted in a manner consistent with this historical rule by providing in Rules 323 (c) and (d) of its Rules of Practice, alternative methods to a verbatim transcript which may be used for appellate review 43 Ill. 2d R. 23 (1969). Rule 323 (c) provides that the appellant may initially prepare a proposed report of proceedings, which can be amended by the appellee and the final version ultimately approved by the trial court. Rule 323 (d) permits the filing of an agreed statement of facts upon written stipulation.

Yet, despite the availability of historical and statutory methods of reconstructing the record, petitioner has made no effort to utilize any of them. Rather, it is his contention that, were he to proceed under the provisions of these Rules, he might find himself in a procedural trap, being bound to an "agreed" or "settled" statement of facts with which he really doesn't agree. Yet a view

of Rules 323 (c) and (d) clearly indicates that once an appellant has initiated a procedure to try to accurately recapture what occurred at trial, he is not irrevocably bound by what subsequently occurs. Rather, if he feels that his discussion with the Court and other counsel renders incomplete or inaccurate results, he is quite free to then request a verbatim transcript as the only possible method under the circumstances to adequately present what occurred to the reviewing court. But this determination must be made after attempting to utilize these other methods, for as was observed in the dissenting opinion of Mr. Justice White in *Draper* v. *Washington, supra.,* counsel for the petitioner could have prepared and presented to the trial judge a bill of exceptions, "as was his duty." 372 U.S. at 503.

Having failed to attempt to prepare a narrative bill of exceptions, and having explained none of the circumstances which prevented them from doing so, (such an attempt at reconstructing the record was apparently made by petitioner and his counsel in *Williams* v. *Oklahoma City,* 395 U.S. 458 (1969)), the attorneys for petitioner are now estopped from contending that petitioner's constitutional rights were violated when the Illinois Supreme Court refused to grant him a free trnascript. (See dissenting opinion of Mr. Justice Harlan in *Griffin, supra.,* at page 32). Petitioner is simply not free to ignore established available methods of procedure upon the supposition that these procedures possibly might not render adequate results.

II.

THE DECISION IN WILLIAMS v. OKLAHOMA CITY DOES NOT REQUIRE THE GRANTING OF A FREE TRANSCRIPT IN THE INSTANT CASE.

It is the contention of the petitioner that the instant case is "identical in all important respects" with *Williams* v. *Oklahoma City,* 395 U.S. 458 (1969), (Appellant's brief, p. 6) and consequently, *Williams* "controls this case." (Appellant's brief, p. 17). However, a reading of *Williams* reveals crucial differences with the instant case and clearly indicates that the holding in *Wiliams* does not require the granting of a free transcript under facts such as presented in the case at bar.

In *Williaas* it was noted that both the trial court and the Oklahoma Court of Criminal Appeals had ruled with regard to petitioner's motion there that no indigent convicted for a violation of a city ordinance petty in nature, was entitled to a case-made or transcript at city expense in order to perfect his appeal from that conviction.

The definition of a 'case-made' under Oklahoma procedure was found on page 8 of the Brief of the respondent in *Williams* v. *the City of Oklahoma City.* Citing *Bennett* v. *State,* 152 P. 2d 388, the respondent quoted the Oklahoma Court of Criminal Appeals:

> "A 'case-made' consists of those things which transpired in court during the trial and which are not part of the record, while a 'transcript of the Record' contains everything of which the clerk is required to make a record."

This definition indicates that a "case-made" is actually synonomous with a verbatim transcript, while a "tran-

script'' under Oklahoma law includes all other portions of the appellate record.

The pertinent Oklahoma statute (Okla. Stat. Ann. Tit. 22 § 1059 (1958)) required that the appellant order a case-made in all criminal cases appealable to the Oklahoma Criminal Court of Appeals, making the preparation of the case-made (or verbatim transcript), in essence, a condition precedent to the docketing of a criminal appeal in Oklahoma.

The Supreme Court held in *Williams* that since a criminal defendant may take an appeal as a matter of right from any judgment against him, that to limit this right to only those who are able to pay for the preparation of a case-made is an unreasoned distinction forbidden by the Fourteenth Amendment.

However, there is no requirement placed on criminal appellants under Illinois procedure to first purchase a verbatim transcript before being afforded the opportunity to appeal. Petitioner Mayer was permitted to docket his appeal in the Illinois Supreme Court and had available under the Rules of the Illinois Supreme Court methods other than the filing of a verbatim transcript in which to present evidence on appeal. Supreme Court Rules, 323 (c) and (d) state as follows:

> "(c) Procedure if No Verbatim Transcript Is Available. If no verbatim transcript of the evidence or proceedings is obtainable the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. It shall be served within 7 days after the notice of appeal is filed. Within 21 days after the notice of appeal is filed, any other party may serve proposed amendments or his proposed report of proceedings. Within 7 days thereafter, the appellant shall, upon notice, present

> the proposed report or reports and any proposed amendments to the trial court for settlement and approval. The court, holding hearings if necessary, shall promptly settle, certify, and order filed an accurate report of proceedings. (d) Agreed Statement of Facts. The parties by written stipulation may agree upon a statement of the facts material to the controversy and file it in lieu of and within the time for filing a report of proceedings."

However, as was noted in Point I of this brief, petitioner chose not to utilize either of these means. But, the essential consideration is that alternative, adequate methods to the purchase of a verbatim transcript are possible under Illinois procedure in order to preserve evidence for appeal. Since such alternatives were not available under Oklahoma law, the facts presented in *Williams* are critically different from those in the case-at-bar. Consequently, the holding in *Williams* does not control the decision to be made in the instant case.

Another important distinction to be drawn between *Williams* and the case-at-bar, indicating that *Williams* is not persuasive authority, is that in *Williams* the defendant received a 90 day jail sentence and a $50 fine, whereas in the present case, petitioner received two $250 fines for violations of two City of Chicago ordinances Municipal Code of Chicago, Ch. 11, § 11-33 and Ch. 193 § 1(a)), which provided for maximum penalties of $500. As will be discussed in Point III of this brief, an analysis of related cases by the Supreme Court indicates a manifest intent not to expand the right to free transcripts to include cases where indigent defendants have been convicted of misdemeanors or ordinance violations where the only possible punishment is a fine.

III.

A REVIEW OF SUPREME COURT DECISIONS IN AREAS RELATED TO THE QUESTION OF FREE TRANSCRIPTS FOR INDIGENT DEFENDANTS INDICATES A CLEAR INTENT TO LIMIT THE GRANTING OF FREE TRANSCRIPTS ONLY TO DEFENDANTS WHO HAVE RECEIVED JAIL SENTENCES.

In considering the merits of the present case, this Court is faced with the important question concerning whether or not to extend the right of an indigent defendant to receive a free verbatim transcript for use on appeal to cases where the defendant has been found guilty of a misdemeanor or ordinance violation, where the only possible punishment is a fine.

Although it was stated in *Griffin* v. *Illinois,* 351 U.S. 12 (1956), the first case granting the right to free transcripts to indigent defendants, that the aim of our entire judicial system is to permit all people charged with crime to "stand on an equality before the bar of justice in every American court" (351 U.S. at 17), it is the position of the authors of this brief that this broad language has been, and indeed, must necessarily be, limited by this Court. A brief review of the recent decisions of this Court concerning the right to a jury trial and the right to counsel indicates that this Court has endeavored to determine the rights of individual defendants in light of the rights of all defendants tried by the American judicial process. As Mr. Justice Frankfurter stated in his concurring opinion in *Griffin*:

> "Nor does the equal protection of the laws deny a State the right to make classifications in law when such classifications are rooted in reason. The equality at which the equal protection clause aims is not a disembodied equality. The Fourteenth Amendment enjoins the "equal protection of the laws" and laws are not abstract propositions." 351 U.S. at 21.

Considering the concrete problems facing the bench and the bar of the United States, this Court has limited both the right to jury trials and the right to counsel.

The right to a trial by jury has always been an integral part of our American system of justice. Indeed, trial by jury was described by Mr. Chief Justice Warren in *Singer* v. *United States,* 380 U.S. 24 (1965) as "the normal and preferable mode of disposing of issues of fact in criminal cases." 380 U.S. at 35. In 1968, this Court was faced with the question of determining whether the Sixth Amendment, guaranteeing the right to a speedy and public trial in all criminal prosecutions, was to be made applicable to the states by the Fourteenth Amendment. In holding that the Sixth Amendment guarantees were protected against state action by the Due Process Clause of the Fourteenth Amendment, this Court in *Duncan* v. *Louisiana,* 391 U.S. 145 (1968) noted that "trial by jury in criminal cases is fundamental to the American scheme of justice." (391 U.S. at 149). Yet, this Court also stated that it has been the long-established view that "petty offenses" may be tried without a jury. The rationale for this limitation was rooted in an historical view of jury trials:

> "So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury

> trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice, *and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive non-jury adjudications.*" 391 U.S. at 160 (Emphasis added)

When this Court was later called on to decide what was to be considered "petty" for the purposes of determining the right to a trial by jury, it ruled that a possible six-month penalty is short enough to permit classification of the crime as "petty." *Baldwin* v. *New York,* 399 U.S. 66 (1970). Although this Court admitted that the disadvantages facing a defendant charged with a crime punishable with up to six months in prison were "onerous," nevertheless, it followed the posture enunciated in *Dunan, supra.* and held that the detriment incurred by such defendants is clearly outweighed by the benefits accruing to the entire judicial system, i.e., keeping the jury trial courts free to try serious offenses.

Indeed, this Court, in promulgating its new Rules of Procedure for the Trial of Minor Offenses before United States Ma'gistrates, 8 Cr. L. 3091 (January 27, 1971), continued to draw the distinction between "petty" offenses and other crimes by denying the right to a jury in the trials of "petty" offenses. (Rule 3(c)(1)).

This practical approach of analyzing the extent of constitutional rights has also been utilized in determining when an indigent defendant is to be permitted the right to appointed counsel. In 1963 the Supreme Court, in *Gideon* v.*Wainwright,* 372 U.S. 335, determined for the first time that an indigent defendant was entitled to

appointed counsel when being tried for a felony. This Court, in determining whether the Sixth Amendment right to counsel was fundamental and essential to a fair trial and, therefore, made obligatory upon the States by the Fourteenth Amendment, looked to language of past decisions. Such language as: "The right to the aid of counsel is of this fundamental character." *Powell* v. *Alabama,* 287 U.S. 45, 68), and "The assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." (*Johnson* v. *Zerbst,* 304 U.S. 458, 462 (1938) led this Court to conclude at 372 U.S. 44:

> "Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."

This Court, in a companion case to *Gideon* decided the same day, *Douglas* v. *California,* 372 U.S. 353 (1963), extended the right to counsel to appeals from felony convictions. Referring to *Griffin* v. *Illinois,* 351 U.S. 12 (1956), the Court noted that once having granted appellate review, a State may not discriminate against some convicted defendants on account of their poverty. Citing *Griffin* once again, this Court went on to state:

> "For there can be no equal justice where the kind of appeal a man enjoys depends on the amount of money he has." 372 U.S. at 355.

Yet, like the broad language found in *Dunan* (*supra.*), with regard to the fundamental and important nature of jury trials, the language of the *Gideon* and *Douglas* decisions has been limited in practical application. The question of whether the right to counsel extends to an indig-

ent defendant facing misdemeanor charges has been considered by several State and Federal courts, with decisions going both ways.[1] However, this Court has refused to consider the issue on at least three occasions. In *Winters* v. *Beck,* 385 U.S. 907 (1966), this Court denied certiorari in a case where a defendant was sentenced to 30 days in jail and received a $254 fine for the misdemeanor of immorality, after being tried without the assistance of counsel. Mr. Justice Stewart, dissented, along with Mr. Justice Black, noting that he would grant certiorari because the Fifth Circuit had ruled in two other cases that the right to free counsel extends to misdemeanors, thereby causing a conflict in law in the same circuit. (See footnote 1). Similarly, in *DeJoseph* v. *Connecticut,* 385 U.S. 982 (1966) certiorari was denied. In that case a defendant, about to be tried for the misdemeanor of criminal non-support, alleged that he was indigent and requested that counsel be appointed. Counsel was denied, the defendant represented himself, was found guilty, and was sentenced to six months. Once again Mr. Justice Stewart dissented to the refusal to grant certiorari and was joined by Mr. Justice Black and Mr. Just-

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1. Decisions holding that the right to counsel extends to indigent misdemeanor defendants include *Harvey* v. *State of Mississippi,* 340 F. 2d 263 (5th Cir. 1965); *McDonald* v. *Moore,* 353 F. 2d 106 (5th Cir. 1965); *People* v. *Mallory,* 378 Mich. 538, 147 N.W. 2d 66 (Mich. 1967).

Decisions denying court-appointed counsel for misdemeanors include *People* v. *Dupree,* 42 Ill. 2d 249, 246 N.E. 2d 281 (Ill. 1969), Cert. Denied, 396 U.S. 1047 (1970); *Winters* v. *Beck,* 239 Ark. 1093, 397 S.W. 2d 364 (Ark. 1965), Cert. Denied, 385 U.S. 907 (1966); *DeJoseph* v. *Connecticut,* 3 Conn. Cir. 624; 222 A. 2d 752 (Conn. 1966), Cert. Denied, 385 U.S. 982 (1966); *State* v. *Bennett,* 266 N.C. 755, 147 S.E. 2d 237 (N.C. 1966).

ice Douglas. Finally, in *People* v. *Dupree*, 42 Ill. 2d 249, 246 N.E. 2d 281 (Ill. 1969), the defendant was convicted of battery, a misdemeanor and was sentenced to two years probation, with the first 90 days to be served in jail. Since the maximum sentence possible was six months in jail and a $500 fine, the Illinois Supreme Court ruled that the defendant did not have to be informed of his right to counsel. Once again certiorari was denied over the dissent of Mr. Justice Black. 396 U.S. 1047 (1970).

Acting in a manner consistent with the denial of certiorari in these three cases, this Court, in issuing its Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, 8 Cr. L. 3091 (January 27, 1971), pointedly failed to include the right to appointed counsel for indigent defendants charged with petty offenses. (See dissent of Mr. Justice Black with Mr. Justice Douglas for a discussion of the issue at page 3093).

It is the position of the authors of this brief that this decision to limit the right to counsel to indigent defendants accused of non-petty offenses is once again based on practical considerations. As the Illinois Supreme Court noted in *People* v. *Dupree, supra.*:

> "To construe as defendant contends, a constitutional mandate that defendant have counsel in all cases, irrespective of the seriousness of the offense, the punishment involved or defendant's request for counsel, unless the record shows his express waiver, would impose burdens upon the bar and bench in no way required or contemplated by the landmark cases protecting constitutional rights in criminal proceedings." (42 Ill. 2d at 256.)

Indeed, a decision to require counsel for all misdemeanor defendants would be strongly felt by the court

system as a whole and by the bar in particular. The social utility of expending the limited resources of the courts and the bar upon petty cases might well be called into question. Injecting lawyers into the approximately 40,000 to 70,000 misdemeanor cases handled each year by just the courts of Cook County, which also handle 180,000 to 210,000 ordinance violation cases annually, would undoubtedly have profound consequences for the administration of both criminal and civil justice.[2]

Others have made the same observation about this problem in other jurisdictions. See *Cableton* v. *State,* 243 Ark. 351, 420 S.W. 2d 534, 536-38 (Ark. 1967); Comment, *The Indigent Defendants' Right to Counsel in Misdemeanor Cases,* 17 S.W. L.J. 593, 612 (1965).

A concrete example of the impact on the bar of extending the right to counsel to all cases involving fines was found in *People* v. *Letterio,* 16 N.Y. 2d 307, 213 N.E. 2d 670 (1965), where the Court of Appeals of New York ruled that no constitutional mandate exists requiring a court hearing a traffic case to advise a defend-

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2. In 1970 the courts of Cook County disposed of 248,207 misdemeanor and ordinance violation cases. *Statistial Report*: *Cases, Fees and Cost, 1967-1970,* prepared by the office of Matthew Danaher, Clerk of the Circuit Court of Cook County, Illinois. The total misdemeanor cases are no longer kept separate from the total number of ordinance violation cases. In 1963, the last time such figures were kept distinct, it was found that there were 4 ordinance violation charges for every misdemeanor charge in Cook County. *Administrative Office of the Illinois Courts, 1967 Annual Report to the Supreme Court,* p. 82. These figures are, of course, exclusive of the over 1,200,000 Cook County traffic cases disposed of annually. *Danaher Report,* p. 12.

ant of his right to counsel. The Court observed at page 672:

> "We point out that the practical result of assigning counsel to defendants in traffic cases would be chaotic. Assigning counsel in but 1% of these millions of cases would require the services of nearly half the attorneys registered in the State (See Tenth Annual Report of Judicial Conference N.Y. Legis. Doc., 1965 No. 90, p. 205)."

Clearly, the limitation placed on the right of an indigent defendant to have the availability of appointed counsel, has been dictated by the practical considerations facing the courts.

Similarly, the question of the extent to which the right to free transcripts by indigent defendants should be applied must be viewed with an eye on the probable impact on the bench and bar. As was noted in footnote 2, there were nearly one-quarter million misdemeanor and ordinance violation cases disposed of in Cook County in 1970. If a constitutional rule were fashioned requiring that indigent defendants convicted of such charges be given free transcripts if they wished, doubtless some of them would avail themself of the opportunity. (It is estimated that 25% of the defendants in misdemeanor cases are indigent. Silverstein, *Defense of The Poor in Criminal Cases in American State Courts* (1965), Vol. 1, pp. 124-125). If but a fraction of one percent of such defendants demanded free transcripts, the effect would be to, in essence, submerge an appellate court system that is already badly losing a battle to dispose of as many cases per year as are filed. The yearly figures published by the Administrative office of the Illinois Courts regarding the five districts of the Appellate Court of Illinois clearly reveal that a severe crisis faces that court. On January

1, 1967, the number of criminal cases pending in the five districts of the Appellate Court totaled 551. Four years later, December 31, 1970, that figure had jumped to 1055, an increase of 91.4%. The civil docket has also increased, but not so dramatically (813 cases on January 1, 1967 to 1206 on December 31, 1970, an increase of 48.3%). Being entrusted with the burden of carrying a greatly increased caseload, the Appellate Court in 1970, disposed of 40 criminal cases which had been on the docket over three years; 153 cases 2 to 3 years old, 85 cases 1½ to 2 years old, 78 cases 1 to 1½ years old, 115 cases 6 to 12 months old, and 94 cases under 6 months old. In short, nearly one-half of the defendants in the 565 cases decided by the Appellate Court of Illinois in 1970 had to wait over a year and a half from the date their appeal was filed until the date the case was decided.

Very bluntly, the Appellate Court finds itself in a vicious circle, with no method available to remove the circle. Although 1496 civil and criminal cases were disposed of in 1970 (1079 with full opinion—an average of 45 opinions per Justice), the Court found itself with a substantially heavier caseload on December 31, 1970, since 1856 cases were filed during the year (360 more cases filed than cases disposed).

Although a new Fifth Division was added to the First District of the Appellate Court in November, 1970, increasing the Appellate Court panels in Illinois from 8 to 9, the increase of the number of Justices by one-eighth will not begin to solve the case-load dilemma. As was noted earlier, the number of criminal cases pending in the Appellate Court has nearly doubled in the last four years and the civil case load has increased by 50 percent. In addition, the Illinois Supreme Court has amended its

own Rule regarding its jurisdiction over criminal matters. Since July 1, 1971, the effective date of the new rules, the Illinois Supreme Court has now become a leave-to-appeal Court, permitting appeal as a matter of right only in criminal cases in which a statute of the United States or the State of Illinois has been held invalid and in appeals by defendants from judgments of the Circuit Courts imposing a sentence of death. All other appeals in criminal cases are to be taken to the Appellate Court (Rule 603, as amended July 1, 1971 Illinois Supreme Court Rules). Quite obviously, the Illinois Supreme Court has divested itself of virtually all its criminal docket, since relatively few cases appear where a criminal statute is held unconstitutional or a defendant is sentenced to death. Since there were 226 criminal decisions rendered by the Illinois Supreme Court in 1970 and since a great percentage of such cases will appear on the Appellate Court dockets in the future, the case-load problem facing the Appellate Courts of Illinois has become even more acute.

In *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967), this Court held that the Sixth Amendment's quaranty of an accused's right to a speedy trial was rendered applicable to the States through the Due Process Clause of the Fourteenth Amendment. If the right to a speedy trial is guaranteed all defendants, most certainly the right to a speedy appeal must also be included. But, when appellate courts such as those in Illinois are already faced with case loads which are impossible to handle adequately, to impose a further burden of deciding cases a number of indigent cases such as the instant case, where the only punishment is a fine, would be a clear denial of due process for those defendants convicted of serious crimes

and awaiting appellate decision. The language of Mr. Chief Justice Warren in this regard in *Coppege* v. *United States,* 369 U.S. 438 (1962) is particularly instructive:

> "No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. . . . The preference to be accorded criminal appeals recognizes the need for speedy disposition of such cases. Delay in the final judgment of conviction, including its appellate review, unquestionably erodes the efficacy of law enforcement." (369 U.S. at 449.)

Consequently, it is suggested that the same approach this Court has taken with regard to the light to jury trials be taken in deciding the instant issue. Although jury trials are "fundamental to the American scheme of justice" *Dunan, supra.* at 149, this Court has limited the right to jury trials to "petty" offenses, recognizing that the necessity for efficient law enforcement and effective judicial administration outweigh the possible adverse consequences to defendants convicted of petty offenses. *Duncan, supra,* at 160. It is therefore suggested that the term "petty" also be utilized in determining what crimes would justify the granting of a free transcript to an indigent defendant. It is further suggested that the case of *Williams* v. *Oklahoma City, supra,* has already provided the definition of a "petty offense" within this context, i.e., a minimum of 90 days in jail. If this standard were established, then appeals by indigent defendants who will never have to face on day in jail would not be placed on already overcrowded appellate dockets, thereby avoiding even longer determinations of cases involving serious crimes.

The language of Mr. Justice Marshall in *Frank* v. *United States,* 395 U.S. 147 (1969), is relevant to this

discussion. In *Frank,* it was determined that a charge of criminal contempt is still to be considered "petty" for the purposes of determining the right to a jury trial even though the defendant was placed on probation for three years. Mr. Justice Marshall noted at page 151:

> "Probation, of course, is a significant infringement of personal freedom, but it is certainly less onerous a restraint than jail itself."

Unlike a sentence of probation, where a defendant is quite restricted in his activity—being required to report periodically to his probation officer, being prohibited from associating with certain types of persons, not being permitted to leave the probation district without the permission of his probation officer, etc.; the defendant in the instant case has had no such restraints placed on his freedom. And, under the recent ruling of *Tate* v. *Short,* 401 U.S. 395 (1971), he cannot now be jailed for financial inability to pay the fine.

Consequently, the facts in the instant case indicate even more strongly than *Frank, supra,* that the offenses here involved were "petty" in nature. Having been charged with ordinance violations for which the only possible punishment was a fine, the petitioner was therefore not entitled to a free transcript for purposes of appeal.

However, if it were to be determined that the petitioner should be given a free transcript for appellate purposes, then it would also seem that a defendant ni similar circumstances should be entitled to free counsel on appeal.

As Mr. Justice Schaefer of the Illinois Supreme Court has stated:

> "Of all the rights that an accused person has, the right to be represented by counsel is by far the most

> pervasive, for it affects his ability to assert any other rights he may have." Schaefer, *Federalism and State Criminal Procedure,* 70 Harv. L. Rev. 1, 8 (1956).

For a indigent defendant to be given a free transcript, but denied the knowledgeable hand of an attorney to assist him on appeal would be to reduce the appellate process for such a defendant to a "meaningless ritual." *Douglas* v. *California, supra.,* 372 U.S. at 358.

Furthermore, it would seem that if free counsel were to be required in all indigent appeals, the necessity of counsel at trial would be even more essential. For, as was stated in *Gideon* v. *Wainwright, supra.,* citing Mr. Justice Sutherland in *Powell* v. *Alabama,* 287 U.S. 45, 68-69 (1932):

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon improper evidence or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." 372 U.S. at 344-345.

But, if appointed counsel were to be granted at trial for indigent defendants who were charged with offenses

which only permit a fine as punishment, such as the charges placed on the instant petitioner, then it would seem that free counsel would have to be appointed in all instances where an indigent has been charged with any violation involving a fine. If this were to occur, then the full time services of virtually the entire membership of the bar would be required as appointed counsel. (See *People* v. *Letterio, supra.*) But even if defendants in traffic cases were to be excluded from these constitutional guarantees, the fact nevertheless remains that nearly 250,000 misdemeanor and ordinance violation cases are disposed of yearly in Cook County, Illinois, alone. (See footnote 2, supra.) It cannot possibly be considered, that this Court, realizing the obvious impact on the administration of justice if the right to counsel were extended to such cases, ever contemplated in *Gideon* that the right to counsel should be extended that far.

Realizing the impact that the logical extensions flowing from the ruling petitioner seeks in the case-at-bar, i.e., appointed counsel at both the appellate and trial levels, this Court must consider the practical considerations involved and therefore, limit, as has been done with the right to trial by jury, the right to a free transcript to only when an indigent defendant has been convicted of a "non-petty" crime.

It has been sated that "Illinois has shown a broad and commendable latitute in implementing the principles enunciated in *Griffin.*" *Norvell* v. *Illinois* (dissent), 373 U.S. 420 at 426. Illinois, in exercising its right to promulgate its own Rules of criminal procedure, (*Spencer* v. *Texas,* 385 U.S. 554, 569 (1967)) has ruled that the petitioner is not entitled to a free transcript since he was charged with an offense involving only a possible fine. Since a State has a further right to moke reasonable

classifications without violating the Due Process Clause of the Fourteenth Amednment, (*Griffin* v. *Illinois, supra.* (concurrence by Mr. Justice Frankfurter, 351 U.S. at 24; *Douglas* v. *California ,supra.,* 372 U.S. at 356), the ruling made in the instant case is clearly constitutional, for it is not at all unreasonable to fail to require the same benefits for defendants convicted of "petty" offenses, such as the instant petitioner, as those provided to defendants convicted of "serious" offenses.

CONCLUSION

For the reasons set forth herein, the office of the State's Attorney of Cook Couny respectfully requests that the Order of the Supreme Court of Illinois denying the petitioner a free transcript for his appeal to that Court be affirmed.

Respectfully submitted,

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APPENDIX

CRIMES PUNISHABLE ONLY BY FINE UNDER THE PROVISIONS OF THE CRIMINAL CODE OF ILLINOIS (ILLINOIS REVISED STATUTES, CHAPTER 38 (1969)

12-1. § 12-1. Assault.] (a) A person commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery.

(b) Penalty.

A person convicted of assault shall be fined not to exceed $500.

16-2. § 16-2. Theft of Lost or Mislaid Property.] A person who obtains control over lost or mislaid property commits theft when he:

(a) Knows or learns the identity of the owner or knows, or is aware of, or learns of a reasonable method of identifying the owner, and

(b) Fails to take reasonable measures to restore the property to the owner, and

(c) Intends to deprive the owner permanently of the use or benefit of the property.

Penalty.

A person convicted of theft of lost or mislaid property shall be fined not to exceed $500 or double the value of such property, whichever is greater.

29A-1. Offering a Bribe.] § 29A-1. A person commits commercial bribery when he confers, or offers or agrees

to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

Added by P.A. 76-1129, § 1, eff. Aug. 28, 1969.

29A-2. Accepting a Bribe.] § 29A-2. An employee, agent or fiduciary commits commercial bribe receiving when, without consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs.

Added by P.A. 76-1129, § 1, eff. Aug. 28, 1969.

29A-3. Penalty.] § 29A-3. A person convicted of commercial bribery or commercial bribe receiving shall be fined not to exceed $5,000.

Added by P.A. 76-1129, § 1, eff. Aug. 28, 1969.

32-1. § 32-1. Compounding a Crime.] (a) A person compounds a crime when he receives or offers to another any consideration for a promise not to prosecute or aid in the prosecution of an offender.

(b) A person convicted of compounding a crime shall be fined not to exceed $500.

32-9. § 32-9. Tampering with Public Notice.] A person who knowingly and without lawful authority alters, destroys, defaces, removes or conceals any public notice, posted according to law, during the time for which the notice was to remain posted, shall be fined not to exceed $200.

50—31. Sale of products in obliterated containers—Prohibition—Exception.] § 1. No person shall sell or offer for sale any product, article or substance in a con-

tainer on which any statement of weight, quantity, quality, grade, ingredients or identification of the manufacturer, supplier or processor is obliterated by any other labeling unless such other labeling correctly restates any such obliterated statement.

This Section does not apply to any obliteration which is done in order to comply with Section 2 of this Act.

50—32. Utilization of used containers—Requisites.] § 2. No person shall utilize any used container for the purpose of sale of any product, article or substance unless the original marks of identification, weight, grade, quality and quantity have first been obliterated.

50—33. Penalty.] § 3. Whoever violates any provision of this Act shall be fined not to exceed $1,000.

70—1. Use by persons, firms or corporations—Prohibition.] § 1. No person, firm or corporation shall use the official stationery or seal or a facsimile thereof, of any State supported university, college or other institution of higher education or any organization thereof unless approved in writing in advance by the university, college or institution of higher education affected, for any private promotional scheme wherein it is made to appear that the organization or university, college or other institution of higher education is endorsing the private promotional scheme.

70—2. Penalty.] § 2. Whosoever violates any provision of this Act shall be fined not less than $50 and not to exceed $500.

82—2. Selling, renting or transfering to children—Prohibition.] § 2. It is unlawful for any dealer to sell, lend, rent, give or otherwise thansfer an air rifle to any person under the age of 13 years where the dealer knows

or has cause to believe the person to be under 13 years of age or where such dealer has failed to make reasonable inquiry relative to the age of such person and such person is under 13 years of age.

82—7. Penalties.] § 7. Any dealer violating any provision of Section 2 of this Act is guilty of a misdemeanor and shall be sentenced to pay a fine of not less than $25 nor more than $200 for each offense.

Any person violating any other provision of this Act shall upon conviction be sentenced to pay a fine not to exceed $50 and costs of prosecution.

IN THE

Supreme Court of the United States

No. 70-5040

JACK L. MAYER,
Appellant,

v.

THE CITY OF CHICAGO,
Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

REPLY BRIEF FOR APPELLANT

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"Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." –Publius, *The Federalist*, No. 51.

"An essential quality of judicial power is . . . always to be at the disposal of the humblest of those who solicit it; their complaint, however feeble they may themselves be, will force itself upon the ear of justice and claim redress, for this is inherent in the very constitution of courts of justice." –Alexis de Tocqueville, *Democracy in America*, Book IV, Chapter VII.

ARGUMENT

I. *WILLIAMS v. OKLAHOMA CITY* IS INDISTINGUISHABLE.

In its brief, the City of Chicago, as Appellee (hereinafter "the City"), suggests that *Williams v. Oklahoma City* is inapplicable here because in *Williams* an Oklahoma statute made the filing of certain portions of the record a "condition precedent" to filing an appeal, whereas Illinois has no such statutory requirement.

Surely this fact, if accurate, cannot be controlling here. For it is as true in Illinois as it is in Oklahoma, indeed everywhere, that in order to present questions to an appellate court a sufficient record of what actually transpired at trial to permit the court to adequately consider the questions raised must be supplied. As Appellant has amply shown in his initial Brief, no alternative means to a transcript for presenting the relevant facts of his case to the Illinois Supreme Court exists. And it is certain that without an adequate factual portrayal of his points on appeal, Appellant will be given short shrift in Illinois. See, *e.g.*, *People v. Rockett*, 85 Ill. App. 2d 24, 228 N.E.2d 219, 223 (1967) (the Illinois courts presume the facts against the appellant when the record presented is inadequate). The "distinction" the City seeks to make, therefore, is between a meaningless appeal and no appeal at all.[1]

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[1] The City's attempt to coax this Court to overrule *Griffin v. Illinois*, 351 U.S. 12 (1956), and the multitude of cases elaborating *Griffin*, on the basis that the abstract concept of equality then preferred by the dissent in that case—that the states have no "affirmative duty to lift the handicaps flowing from differences in economic circumstances"—should once again obtain, evidences a serious misconception of the nature of the Constitutional value at stake. The rejoinder has been well made:

> "Equality never means equality. Equality is always for some purpose and in a sense it includes inequality . . . . It includes the notion of compensating. The law has always done that. If a person deals with an expert, the expert has to be more cautious than the other person, because that's equality, and so on. To say that there can't be equality and

II. THE CONSTITUTIONAL RIGHT TO VINDICATE INNOCENCE THROUGH A TRANSCRIPT SHOULD INURE TO ALL PERSONS WHOM THE STATE SEEKS TO PENALIZE AND STIGMATIZE THROUGH ITS CRIMINAL LAWS, OR WHO FACE THE BURDEN OF ANY PENAL SENTENCE.

The City urges this Court to approve Illinois' denial of a fundamental Constitutional right to Appellant—the Fourteenth Amendment right to a transcript or report of proceedings needed to demonstrate substantial trial errors—on the ground that the punishment Illinois chose to exact here took the form of a substantial and crippling fine rather than some form of imprisonment or jail. Constitutional rights, the City says, should stop at the jailhouse door. This should be true, the argument seems to proceed, even though real and serious consequences attend conviction and imposition of punishment in cases not resulting in a jail term. In such cases the State should get its pound of flesh and the citizen should not seek justice: especially not in long-standing Constitutional doctrine such as this Court propounded in *Griffin v. Illinois*, 351 U.S. 12 (1956).

The distinction between jail and non-jail which the City urges this Court to adopt as a stopping point for the Fourteenth Amendment is devoid of meaning and purpose. Does a sentence to imprisonment or jail include a suspended sentence? Probation? Work-release? Sentence to a "Juvenile Home" or "Treatment Center" or, as in Cook County, to a "House of Correction"? A "half-way house"? Is an indigent person whose sentence on a felony or misdemeanor is suspended to receive constitutional protection while an indigent sentenced to pay a $1,000 fine for violation of a municipal ordinance is not? Such an arbitrary distinction

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therefore the idea is thrown away is really not understanding the dynamism that is in the very concept of equality itself.". Edward H. Levi, in *The Quality of Inequality: Urban and Suburban Public Schools* (Univ. of Chicago Center for Policy Study 1968, at pp. 111-112).

would be especially inappropriate at this point in history, when the concept of imprisonment as a means of dealing with the vast bulk of offenders is losing its tenability. See, *e.g.*, George Bernard Shaw, *The Crime of Imprisonment* (Philosophical Library, N.Y., 1946); Hans Mattick and Aikman, "The Cloacal Region of American Corrections," *The Annals of the American Academy of Political and Social Science*, Vol. 381, pp. 109-118 (Jan. 1969). We are increasingly coming to understand that "for the large bulk of offenders, particularly the youthful, the first or the minor offender, institutional commitments can cause more problems than they solve." *The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice*, p. 165 (U.S. Gov. Printing Office, 1967). Recent outbreaks in prisons across the country, and reactions to them, attest to the need, proclaimed in editorials and journals alike, for prison reform and alternatives to imprisonment. These demands will increase and alternatives will be found. Are then most citizens convicted of crime to lose their Constitutional rights because they do not happen to be sentenced to jail?

Whether or not the State chooses to inflict one form of punishment or another in a given case or category of offenders—by jail, fine, probation or otherwise—is irrelevant to the Constitutional interest at stake here. The Fourteenth Amendment right to "stand on an equality before the bar of justice in every American court," *Chambers v. Florida*, 309 U.S. 227, 241 (1940), by being able, through a transcript, to demonstrate innocence of the crime charged and the lack of a fair trial, exists, at a minimum, *wherever a penal burden is sought to be imposed by the State.* An indigent's right to equality exists in at least some "civil" situations as well. *Boddie v. Connecticut*, 401 U.S. 371 (1971) (divorce). The factor of imprisonment—one of many forms of detriment and stigma—cannot be a necessary condition for the existence of the right.[2]

[2]Contrary to the City's urgings, there is no magic to the fact that the prosecuting authority here happened to be a municipality of the State rather than the State itself. This Court has often applied the

III. THE CITY'S FANTASY OF A "FLOOD" OF "TRIVIAL" APPEALS IS REFUTED BY THE FACTS

The City in its brief employs, as expected, the "scare tactic" of assuming that to grant this Appellant his transcript is somehow to extend "the *Griffin* principle to every conceivable petty offense." *Brief of Appellee* at 17. We are told that there are "a bewildering variety" of ordinance violations, "an untold number" of which "are petty and many are of the utmost triviality." *Brief of Appellee* at 16. Moreover, the City posits a "flood" of appeals in these "trivial" cases, most of which, it assures us, will be "frivolous." Searching at length to find support for this hypothesis, the City devotes pages of its Brief to a recitation of the number and location of courtrooms in Cook County, the estimated total numbers of non-felony violations charged in the nation each year, and the growth in recent years in appellate dockets. It is apparent that none of these facts bear on the issue here.

In the first place, it is no argument that a starving man should be denied food because someone else who is not starving may later come along and ask for some. It is in the nature of the judicial task to draw lines. There is no unique difficulty to doing so here. And it is a fallacy to assume that because a felony case may in general be more important to a defendant than a non-felony case, that therefore all non-felony cases are unimportant to all defendants. The City's continued assertion that these are "petty" cases creates the false equation felony-important therefore non-felony-unimportant.[3]

Fourteenth Amendment (*Yick Wo v. Hopkins*, 118 U.S. 756 (1886); *Williams v. Oklahoma City*, 395 U.S. 458 (1969)), and other Amendments (*e.g.*, *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967) (the Fourth Amendment)), to municipal fine cases.

[3]There is no reason to assume, as the City would have us, that truly "trivial" cases will be appealed. Of course, the City's evaluation of what is "trivial" may be expected to differ from a particular defendant's.

Secondly, no one wishes the courts to be flooded with any cases, much less trivial cases, and much less frivolous and trivial cases. Certainly our courts are already overburdened with trivial and frivolous cases, in the sense that such cases do exist on the dockets, and any number is too many. We would wish them all away. But a rational and just solution surely is not to draw a line which closes the appellate doors only to the impoverished (meritorious and unmeritorious alike), while leaving the doors open to the more affluent (meritorious and unmeritorious alike). Clearly, wherever the answer to crowded dockets lies, it does not lie down the road of closing the court system only to the poor.

Thirdly, and most importantly, as the City's own statistics amply demonstrate, whether for "triviality" or some other reason, almost all convicted nonfelony defendants (and especially ordinance violators) *choose not to appeal when they have full means to do so.* For, as the studies which the City cites show (*Brief for Appellee* at 32-33), no more than 25% of misdemeanor defendants are indigent, and a vastly lower percentage of ordinance violators are so, yet it is a striking fact that our appellate systems are so free of appeals from convictions for "minor" offenses. See *Brief of Appellant* at 33-34, n. 36.[4] The significance of this in-

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[4]For the one-year period December 1969–December 1970, the Illinois Appellate Court, all districts, decided a total of 1421 appeals (120 Ill. App. 2d–129 Ill. App. 2d). Those 1421 appeals represent the following:

Number of Appeals	*Percent of Total Appeals*
total civil appeals: 1171	82%
total criminal appeals: 250	18%
total nonfelony criminal appeals: 30	2%
total defendant sentenced to fine only: 17	1%
total ordinance violations: 4	.3%
total traffic violations: 15	1%
total (all types of appeal): 1421	100%

digency figure is not, as the City assumes, to suggest that 25% of all misdemeanor cases will appear on the appellate dockets, *but rather that at least 75% of all such defendants have the means to appeal their convictions but have chosen not to do so.* Silverstein, *Defense of the Poor*, 124-125 (Vol. 1, 1965). If our appellate dockets are so devoid of misdemeanor and ordinance appeals *when over 3 out of every 4 defendants possess the financial means to appeal*, there is no reason to believe, indeed there is positive ground to disbelieve, that making an appeal possible for a deserving indigent defendant in the remaining one-quarter or less of cases will cause any statistically significant increase at all in docket size. The inevitable conclusion following from these figures is that whatever the factors are which motivate and determine the appeal rate in these misdemeanor and ordinance cases, it is *not* the money to procure a transcript.[5]

The City has gone to some length in its brief to overwhelm the Court with numerous figures and statistics relating to such items as the courtrooms and cases in Cook County, Illinois and selected appellate docket figures. Unlike Appellant's systematic presentation of facts and assumptions, the City employs an amorphous shotgun approach to data. The relevance or meaningfulness of most of the statistics cited by the City, assuming their accuracy, is tangential or obscure. Therefore, only several points with relation to them will be made here.

1. Since the issue here is the right of a convicted poor person to an existing, available transcript necessary, *inter alia*, to demonstrate the conduct of the prosecutor which

[5]Note should be made when discussing the "cost" of providing free transcripts to indigents that improvements in the technology of reporting trials, principally by the use of tape recorders and recording devices, have made possible enormous savings in stenographic fees. Such devices are now operational in many federal courts. The reluctance on the part of states and counties to effect these savings by installing such devices speaks eloquently perhaps to the effectiveness of the stenographers' lobby.

resulted in the deprivation of a fair trial, figures about the number of *charges* brought per year against nonfelony defendants, and the number of courtrooms or trials, are not meaningful. See *Brief for Appellee* at 28-32. What is perhaps meaningful is the number of *convictions after trial*, which excludes pleas of guilty. This figure comprises the total possible universe of appeals. The number of acquittals, trials, or pleas are unimportant except so far as they illuminate this category. The City's statistics on this point obfuscate, not illuminate. *Cf.*, *Brief for Appellant* at pp. 28-38.

2. The City's figures on the docket increase for the Supreme Court of Washington between 1962 and 1968 (*Brief of Appellee* at 24) demonstrate the opposite of what the City argues they show. Far from showing a flood of indigent appeals, the figures show, for the full years 1962 to 1967 inclusive, a percentage increase of over 300% in criminal appeals but an increase of only 17% overall in the percentage of those appeals which are indigent appeals. There was, then, indeed a dramatic increase in *criminal* appeals, but the number of *indigent* criminal appeals merely kept pace, with some slight increase possibly due to increased awareness of the right, with the non-indigent criminal appeals. Moreover, the fact that the Public Defender of Cook County averaged only 6 felony appeals per year up until 1964 says something about the way justice actually is measured out in Illinois. A subsequent increase to 150 per year hardly supports the idea that the Public Defender is in the business of generating frivolous appeals. It attests to a need which was unsatisfied. But even so the felony experience is not a persuasive model for the misdemeanor and ordinance experience.[6]

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[6]The estimate cited with respect to the cost of providing *counsel* at the *trial* of all misdemeanor cases–$62,500,000 for all state courts (Silverstein, *Defense of the Poor* (1965) Vol 1, pp. 124-125) (an average of little over a million dollars per state per year) is hardly a persuasive "horrible" here. In the first place, the average ordinance violation does not require much counsel time. In the second place,

There can be no denying that—indeed it is only to be hoped that—there will be *some* increase in appeals as a result of a favorable decision in this case. Some victims of administered injustice will be able to secure reversals and the level of justice will increase. A net social gain will result. This is wholly to be desired.

Will there be a "flood" of nonfelony appeals? The facts clearly suggest otherwise. There will, at most, be some increase in the few non-felony appeals now on the dockets. See *Brief for Appellant* at 33, n. 36. One-quarter of a few is not many.

Will there be many "frivolous" nonfelony appeals? Assuming for a moment we agree on what is a "frivolous" appeal, since there will not be many nonfelony appeals, especially ordinance appeals, there will not be many "frivolous" ones.

Will "petty" cases be appealed in great numbers? They are not being so now although most persons convicted of petty offenses have ample means to do so. Clearly other factors than the availability of means to afford a transcript control the decision not to appeal these cases.

IV. THE CONCEPT OF INDIGENCY IS WELL KNOWN TO THIS COURT.

In an apparent attempt to wind the clock back several decades, the City attacks the notion of indigency itself, and seems to argue that, because there are no sharp lines between the categories "those too poor to pay" and "those not too poor to pay" for transcripts, therefore to provide transcripts to the former discriminates against "the working

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the question presented is not whether all nonfelony defendants should be afforded free *counsel* at their *trials*, but whether a particular appellant can have access to a copy of his *transcript* in order to demonstrate to the Supreme Court of Illinois that he was wrongly convicted of two criminal offenses and sentenced to pay a $1,000 fine.

majority," who must purchase their transcripts "with hard-earned money." Surely this is disingenuous.

The concept of indigency is not one invented by this Appellant. Neither is it rigid in its application, as the many and various states and courts have worked out its specific content in cases that arise. In its application it is necessarily dependent upon the complex and detailed facts peculiar to the living condition of each applicant. Indigency is a factual question like all other factual questions and the courts have experienced no unusual difficulties in determining its specific content in each case.

Such was done here. The Circuit Court of Cook County, after a hearing, found this Appellant to be indigent. The City's attempts now to reargue in this Court this factual finding of record (those same arguments were rejected by the Circuit Court) is wholly inappropriate.

CONCLUSION

The order of the Supreme Court of Illinois denying Appellant's right to a transcript without payment of a fee should be reversed.

Respectfully submitted,

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Attorneys for Appellant

APPENDIX OF STATE STATUTORY PROVISIONS AFFORDING TRANSCRIPTS FOR INDIGENT APPEALS IN FINE-ONLY CASES

A. *Introductory Note*

The lowest courts in the land, for example Justice of the Peace Courts, impose far and away the bulk of the fines, shorter jail terms, and similar penalties imposed on defendants in cases involving municipal ordinances, in traffic cases, and in certain non-penal regulatory proceedings. Some states expressly provide for the recording of testimony taken in these courts. For example, the Alaska Magistrate's Rules provide for electronic recording, and South Carolina Laws Sec. 7-104 requires a magistrate, upon a defendant's appeal, to file "the testimony in writing taken at the trial." But most states do not expressly provide for the recording of proceedings in these lowest courts. In these states it is unclear whether, in practice, such recordings are routinely made. It is uniformly required in these states, as a minimum, that judgment-roll records be kept of Justice of the Peace court proceedings.

For this reason, in all states (with the possible exception of Florida), an appeal is allowed from the lowest courts, which results in a trial *de novo* in a court of more general jurisdiction, where testimony taken in stenographically preserved. (In fact, relatively few defendants avail themselves of this opportunity to appeal.) It is the transcript of proceedings in these courts of more general jurisdiction that is necessary for any further appeal, or for initial appeal in those cases initially prosecuted in these courts.

This Appendix is not intended as a comprehensive statement of state transcript law; such an undertaking proved to be too complex. It does not include case law. Its focus is rather on the statutory provisions in those states which provide at least some qualifying indigents with transcripts in appeals from conviction for offenses punishable only by fine. The statutes of several states speak only in terms of felony convictions, or a certain term of imprisonment, and

these have been omitted. Included here are the statutes of 39 (approximately 75%) of the states, which statutes appear to provide transcripts for at least some indigent appellants sentenced only to pay a fine. In at least 29 of these states, there is an express statutory provision for free transcripts. At least 12 states, including four of the 29, provide counsel through appeal to at least some indigents sentenced to pay a fine only, and reimburse counsel's expenses.

B. *Counsel for Indigent Appellants Convicted of Fine-Only Offenses.*

The following states provide indigents convicted of certain fine-only offenses with counsel through appeal. Generally these states either provide a public defender system, which would pay for the cost of the transcript necessary to the appeal, or they reimburse appointed counsel for his reasonable expenses, which in the case of an appeal presumably includes the expense of necessary transcript preparation.

1. *California:* Penal Code 987.2 (1970).

2. *Colorado:* Stat. 39-21-3 (1963).

3. *Georgia:* Code Sec. 27-32 (1969).

4. *Idaho:* Code 19-851 *et seq.* (1969) ($300 fine entitles appellant to appointed counsel).

5. *Montana:* Code 95-1001 (1967); Code 95-1005 (1967).

6. *Nevada:* Stat. 178.397 (1967); Stat 260.060; Stat. 7.260 ($500 fine entitles appellant to appointed counsel).

7. *New Hampshire:* Stat. Sec. 604-A:1 *et seq.* (1967).

8. *New York:* Court of Appeals Rule 500.8.

9. *North Carolina:* Stat. Sec. 7A-450 *et seq.* (1969) ($500 fine entitles appellant to appointed counsel).

10. *North Dakota:* Code 29-07-01.1 (1967).

11. *South Dakota:* Laws Sec. 23-2 (1969).

12. *Vermont:* Stat. T.13, Sec. 6503 (1963) ($500 fine entitles appellant to counsel).

C. *Transcript Provisions for Indigents Convicted of Fine-Only Offenses*

The following 29 states have express transcript provisions broad enough to include transcripts for many indigents convicted of offenses punishable only by fine.

1. *Alabama:* Code T. 15, Sec. 380 (14-25) (1963).

2. *Arizona:* Criminal Procedure Rules 360 and 361; Stat. Sec. 12-123.

3. *Arkansas:* Stat. 22-357 (1962) (free transcripts to indigents in "all cases").

4. *Connecticut:* Stat. Sec. 54-151 (1967).

5. *Delaware:* Supreme Court Rule 10 A (any "indigent criminal appellant" gets free transcript if needed).

6. *Florida:* Appellate Rule 6.8 (free transcripts to all "appealing defendants"); Stat. 924.08 (1963) (no appeals on evidence from trials *de novo* in circuit courts).

7. *Hawaii:* Stat. Sec. 705-5 (1967) (discretionary free transcripts); Sec. 611-1 *et seq.* (free counsel for indigents charged with offenses punishable by imprisonment for more than 60 days).

8. *Idaho:* Code 1-1105 (1963) (free transcripts in "criminal actions"); Code 19-851 *et seq.* (1969) (free counsel and court services for crimes punishable by a fine of more than $300).

9. *Indiana:* Stat. 4-7309 (1968).

10. *Iowa:* Code Sec. 793.8 (1946).

11. *Kansas:* Stat. 62-3109 (1969) (any indigent entitled to appeal).

12. *Kentucky:* Stat. 28-440(1) -.460(2a) (1968) (free transcripts in all "criminal cases").

13. *Maine:* Criminal Procedure Rule 39A (conviction of "a crime").

14. *Maryland:* Rules of Procedure 1083(b) (free transcript in a "criminal case").

15. *Minnesota:* Stat. Sec. 611.07(1969)(free transcripts for offenses punishable by a fine of $100).

16. *Mississippi:* Code Sec. 1175, 1640 (1971) (in all "criminal cases").

17. *Missouri:* Stat. 485.100 (1965) (in all "criminal cases").

18. *Nebraska:* Stat. Sec. 24-342 (1964) (in "criminal cases").

19. *Nevada:* Stat, 177.345 (1969) (free transcripts for offenses punishable by 6 months imprisonment or a fine of $500).

20. *New Jersey:* Stat. 2A:152-17 (1956) (free transcript for "indigent convicted of any crime").

21. *New York:* Code of Criminal Procedure Sec. 456 (1962) (any "crime").

22. *North Carolina:* Stat. Sec. 7A-450 *et seq.* (1969) (offenses punishable by more than six months imprisonment or a fine of $500).

23. *Oklahoma:* Stat. 20 Sec. 106.4 (b) (1970) (any "criminal action").

24. *Oregon:* Stat. 138.500(2) (1969) (any "criminal action").

25. *South Carolina:* Laws Sec. 7-104 (1962); Sec. 7-343 (1962); Sec. 15-1903 (1962) (any "criminal case").

26. *Texas:* Code of Criminal Procedure Art. 40.09 (5); 4.03 (1965) (any indigent case over $100 fine gets free transcript).

27. *Utah:* Code 77-64-1, 77-64-5 (1965) (appointed counsel and free transcript to indigent defendants facing "the possibility of the deprivation of his liberty or other serious criminal sanction").

28. *Washington:* Code 2.32.240 (1970) (in "any criminal case").

29. *West Virginia:* Code Sec. 51-7-7 (1965).

D. *Free Transcripts Where Decreed by this Court.*

Alaska and Wisconsin have enacted provisions which will automatically provide free transcripts for indigents in any circumstances where the United States Supreme Court finds them required by the Constitution.

1. *Alaska:* Magistrate Rules 1 (i) and 2 (b); Court Rule 43 (b).

2. *Wisconsin:* Stat. 974.01(3) (1969).

MAYER *v.* CITY OF CHICAGO

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 70–5040. Argued October 14, 1971—
Decided December 13, 1971

Appellant was convicted on nonfelony charges of violating two city of Chicago ordinances and was sentenced to pay a fine of $250 on each offense. Desiring to appeal, he petitioned the trial court for a free trial transcript to support his appeal on the grounds of insufficient evidence and prosecutorial misconduct. Although the court found that he was indigent, it denied his application on the basis of an Illinois Supreme Court rule which provided for trial transcripts only in felony cases. Other rules provided alternatives to a transcript in the form of a "Settled Statement" or an "Agreed Statement of Facts." Without resorting to either alternative, appellant moved for a free transcript in the State Supreme Court. The motion was denied. *Held:*

1. Although the State must afford the indigent defendant a trial " 'record of sufficient completeness' to permit proper consideration of [his] claims," *Draper* v. *Washington,* 372 U. S. 487, 499, it need not necessarily furnish a complete verbatim transcript, but may provide alternatives that accord effective appellate review. Pp. 193–195.

2. When the defendant's grounds for appeal, as here, make out a colorable need for a complete transcript, the State has the burden of showing that only a portion thereof or an "alternative" will suffice for an effective appeal on those grounds. P. 195.

3. The distinction drawn by the State Supreme Court rule between felony and nonfelony offenses is an "unreasoned distinction" proscribed by the Fourteenth Amendment. Pp. 195–196.

4. The fact that the charges on which the appellant was convicted were punishable by a fine rather than by confinement does not lessen the invidious discrimination against an indigent defendant. Pp. 196–198.

Vacated and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court. BURGER, C. J., *post,* p. 199, and BLACKMUN, J., *post,* p. 201, filed concurring opinions.

Henry F. Field argued the cause for appellant. With him on the briefs were *Thomas B. McNeill* and *Robert A. Burt.*

Richard L. Curry argued the cause for appellee. With him on the brief were *William R. Quinlan* and *Edmund Hatfield.*

Vincent Bentivenga and *Paul P. Biebel, Jr.*, filed a brief for the State's Attorney of Cook County, Illinois, as *amicus curiae* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A jury in the Circuit Court of Cook County, Illinois, convicted appellant on nonfelony charges of disorderly conduct and interference with a police officer in violation of ordinances of the city of Chicago. He was sentenced to a $250 fine on each offense; violation of each ordinance carried a maximum penalty of $500. Desiring to appeal, he petitioned the Circuit Court for a free transcript of the proceedings of his trial to support his grounds of appeal that the evidence was insufficient for conviction and that misconduct of the prosecutor denied him a fair trial.[1] The Circuit Court

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[1] A court reporter was provided at appellant's trial pursuant to the State Court Reporters Act, Ill. Rev. Stat., c. 37, § 651 *et seq.* (1969). It was estimated that the cost of preparing a transcript would be $300. The record refers in some places to a two-day trial and in other places to a three-day trial.

Under Illinois law at the time of appellant's convictions an appeal lay as of right either to the Illinois Supreme Court or to the Illinois Appellate Court, depending upon the nature of the case or the contentions raised. See Constitution of Illinois 1870, Art. 6, §§ 5, 7. If a case was erroneously appealed to the wrong court, it was transferred to the proper court without any loss of rights. Illinois Supreme Court Rule 365, Ill. Rev. Stat., c. 110A, § 365 (1969). Of course, whether an appeal is discretionary or as of right does not

found that he was indigent, but denied his application, stating "that defendant was found guilty of ordinance violations and . . . rule 607 of the Supreme Court applies to felony cases." The reference was to Illinois Supreme Court Rule 607 (b), which in pertinent part provided: "In any case in which the defendant is convicted of a *felony*, he may petition the court in which he was convicted for a report of proceedings at his trial." [2] (Emphasis supplied.) Other Illinois Supreme

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affect an indigent's right to a transcript, since "[i]ndigents must . . . have the same opportunities to invoke the discretion of the" court as those who can afford the costs. *Burns* v. *Ohio*, 360 U. S. 252, 258 (1959).

[2] The full text of Rule 607 (b), Ill. Rev. Stat., c. 110A, § 607 (b) (1969), was as follows:

"Report of Proceedings. In any case in which the defendant is convicted of a felony, he may petition the court in which he was convicted for a report of proceedings at his trial. If the conduct on which the felony case is based was also the basis for a juvenile proceeding which was dismissed so the felony case could proceed, the defendant may include in his petition a request for a report of proceedings in the juvenile proceeding. The petition shall be verified by the petitioner and shall state facts showing that he was at the time of his conviction, and is at the time of filing the petition, without financial means to pay for the report. If the judge who imposed sentence, or in his absence any other judge of the court, finds that the defendant is without financial means with which to obtain the report of proceedings at his trial, he shall order the court reporter to transcribe an original and copy of his notes. The original of the report shall be certified by the reporter and filed with the clerk of the trial court as provided below, and the copy shall be certified by the reporter and delivered to the defendant without charge. The reporter who prepares a report of proceedings pursuant to an order under this rule shall be paid the same fee for preparing the transcript as is provided by law for the compensation of reporters for preparing transcripts in other cases."

Following *Griffin* v. *Illinois*, 351 U. S. 12 (1956), the Illinois Legislature authorized free transcripts for indigents "[u]pon imposition of any sentence in a criminal case." See Ill. Ann. Stat., c. 38,

Court rules, Rules 323 (c) and 323 (d), provided for alternatives to a transcript in the form of a "Settled Statement" or an "Agreed Statement of Facts."[3] Without resorting to either alternative, appellant made a motion in the Illinois Supreme Court for an order that he be

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§ 121–13 (a) and committee comments appended thereto (1964). However, under authority allowing the State Supreme Court, in effect, to amend code provisions governing criminal appeals, *id.*, § 121–1, the court promulgated Rule 607 (b) authorizing transcripts at State expense only for indigents convicted of a felony. The rule was amended effective July 1, 1971, to apply to "any case in which the defendant is convicted of an offense punishable by imprisonment for more than six months." 1971 Illinois Legislative Service, No. 5, p. 1703.

[3] These rules, Ill. Rev. Stat., c. 110A, § 323 (c) and (d) (1969), provided:

"(c) Procedure If No Verbatim Transcript Is Available. If no verbatim transcript of the evidence or proceedings is obtainable the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. It shall be served within seven days after the notice of appeal is filed. Within 21 days after the notice of appeal is filed, any other party may serve proposed amendments or his proposed report of proceedings. Within seven days thereafter, the appellant shall, upon notice, present the proposed report or reports and any proposed amendments to the trial court for settlement and approval. The court, holding hearings if necessary, shall promptly settle, certify, and order filed an accurate report of proceedings.

"(d) Agreed Statement of Facts. The parties by written stipulation may agree upon a statement of the facts material to the controversy and file it in lieu of and within the time for filing a report of proceedings."

These rules were also amended effective July 1, 1971, but not in ways material to this case. See 1971 Illinois Legislative Service, No. 5, p. 1690. Despite the provision limiting use of a "Settled" statement to cases where no verbatim transcript is "available" or "obtainable," the procedure of subsection (c) evidently is permissible even though the court reporter's notes are available for transcription. See Tone, New Supreme Court Rule on Expeditious and Inexpensive Appeals, 53 Ill. B. J. 18, 20 (1964).

furnished a transcript of proceedings without cost. The Supreme Court denied the motion in an unreported order without filing an opinion. We noted probable jurisdiction of appellant's appeal challenging the constitutionality of the limitation of Rule 607 (b) to felony cases. 401 U. S. 906 (1971).

I

Griffin v. *Illinois*, 351 U. S. 12 (1956), is the watershed of our transcript decisions. We held there that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.*, at 19. This holding rested on the "constitutional guaranties of due process and equal protection both [of which] call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." *Id.*, at 17. We said that "[p]lainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence . . . ," *id.*, at 17–18, and concluded that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.*, at 19. Appellee city of Chicago urges that we re-examine *Griffin*. We decline to do so. For "it is now fundamental that, once established . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi* v. *Yeager*, 384 U. S. 305, 310 (1966).[4] Therefore, "[i]n all cases the duty of the State

[4] Our decisions on the question of free transcripts for indigents include: *Wade* v. *Wilson*, 396 U. S. 282 (1970); *Williams* v. *Oklahoma City*, 395 U. S. 458 (1969); *Gardner* v. *California*, 393 U. S. 367 (1969); *Roberts* v. *LaVallee*, 389 U. S. 40 (1967); *Long* v. *District Court of Iowa*, 385 U. S. 192 (1966); *Draper* v. *Washington*, 372 U. S. 487 (1963); *Lane* v. *Brown*, 372 U. S. 477 (1963); *Coppedge* v. *United States*, 369 U. S. 438 (1962); and *Eskridge* v. *Washington Prison Bd.*, 357 U. S. 214 (1958).

is to provide the indigent as adequate and effective an appellate review as that given appellants with funds . . . ." *Draper* v. *Washington*, 372 U. S. 487, 496 (1963). In terms of a trial record, this means that the State must afford the indigent a " 'record of sufficient completeness' to permit proper consideration of [his] claims." *Id.*, at 499 (quoting *Coppedge* v. *United States*, 369 U. S. 438, 446 (1962)).

A "record of sufficient completeness" does not translate automatically into a complete verbatim transcript. We said in *Griffin* that a State "may find other means [than providing stenographic transcripts for] affording adequate and effective appellate review to indigent defendants." 351 U. S., at 20. We considered this more fully in *Draper* v. *Washington*, *supra*, at 495–496:

> "Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript. Moreover, part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances. If, for instance, the points urged relate only to the validity of the statute or the sufficiency of the indictment upon which conviction was predicated, the transcript is irrelevant and need not be provided. If the assignments of error go only to rulings on evidence or to its sufficiency, the transcript provided might well be limited to the portions relevant to such issues. Even as to

this kind of issue, however, it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted. In the examples given, the fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review."

We emphasize, however, that the State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way. Moreover, where the grounds of appeal, as in this case, make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an "alternative" will suffice for an effective appeal on those grounds. This rationale underlies our statement in *Draper, supra,* at 498, that:

"[T]he State could have endeavored to show that a narrative statement or only a portion of the transcript would be adequate and available for appellate consideration of petitioners' contentions. The trial judge would have complied with . . . the constitutional mandate . . . in limiting the grant accordingly on the basis of such a showing by the State." [5]

II

The distinction between felony and nonfelony offenses drawn by Rule 607 (b) can no more satisfy the requirements of the Fourteenth Amendment than could the like

[5] See also *Gardner* v. *California,* 393 U. S., at 370 (noting no suggestion made of an adequate substitute for a full transcript); *Eskridge* v. *Washington Prison Bd.,* 357 U. S., at 215 (noting State's failure to show availability of trial notes).

distinction in the Wisconsin law, held invalid in *Groppi* v. *Wisconsin*, 400 U. S. 505 (1971), which permitted a change of venue in felony but not in misdemeanor trials. The size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case. The distinction drawn by Rule 607 (b) is, therefore, an "unreasoned distinction" proscribed by the Fourteenth Amendment. *Rinaldi* v. *Yeager*, *supra*, at 310. That conclusion follows directly from our decision in *Williams* v. *Oklahoma City*, 395 U. S. 458, 459 (1969), rejecting the argument " 'that an indigent person, convicted for a violation of a city ordinance, quasi criminal in nature and often referred to as a petty offense, is [not] entitled to a case-made or transcript at city expense in order to perfect an appeal . . . .' "[6]

III

The city of Chicago urges another distinction to set this case apart from *Griffin* and its progeny. The city notes that the defendants in all the transcript cases previously decided by this Court were sentenced to some term of confinement. Where the accused, as here, is not subject to imprisonment, but only a fine, the city suggests that his interest in a transcript is outweighed by the State's fiscal and other interests in not burdening the appellate process. This argument misconceives the principle of *Griffin* no less than does the line that Rule 607 (b) expressly draws. *Griffin* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against

[6] It is true, as the city of Chicago argues, that in *Williams* the defendant was effectively denied any right of appeal, whereas here a transcript was not a condition precedent for appeal. The constitutional infirmity in Rule 607 (b) is not the less for that reason. The indigent defendant must be afforded as effective an appeal as the defendant who can pay.

pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant. Cf. *Shapiro* v. *Thompson*, 394 U. S. 618, 633 (1969).

We add that even approaching the problem in the terms the city suggests hardly yields the answer the city tenders. The practical effects of conviction of even petty offenses of the kind involved here are not to be minimized. A fine may bear as heavily on an indigent accused as forced confinement. The collateral consequences of conviction may be even more serious, as when (as was apparently a possibility in this case) the impecunious medical student finds himself barred from the practice of medicine because of a conviction he is unable to appeal for lack of funds. Moreover, the State's long-term interest would not appear to lie in making access to appellate processes from even its most inferior courts depend upon the defendant's ability to pay. It has been aptly said:

> "[F]ew citizens ever have contact with the higher courts. In the main, it is the police and the lower court Bench and Bar that convey the essence of our democracy to the people.
>
> "Justice, if it can be measured, must be measured by the experience the average citizen has with the police and the lower courts."[7]

Arbitrary denial of appellate review of proceedings of the State's lowest trial courts may save the State some

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[7] Murphy, The Role of the Police in Our Modern Society, 26 The Record of the Association of the Bar of the City of New York 292, 293 (1971).

dollars and cents, but only at the substantial risk of generating frustration and hostility toward its courts among the most numerous consumers of justice.

IV

We conclude that appellant cannot be denied a "record of sufficient completeness" to permit proper consideration of his claims. We repeat that this does not mean that he is automatically entitled to a full verbatim transcript. He urges that his claims of insufficiency of the evidence and prejudicial prosecutorial misconduct cannot be fairly judged without recourse to the trial record.[8] *Draper* suggests that these are indeed the kinds of claims that require provision of a verbatim transcript.[9] See also *Gardner* v. *California*, 393 U. S. 367 (1969). In *Draper*, however, the State of Washington did not undertake to carry its burden of showing that

[8] It is not clear whether appellant seeks a full transcript. What he applied for and was denied in the Circuit Court was only "such portion of the trial transcript as the parties may designate." Moreover, he stated in his brief to the State Supreme Court that "it is expected that certain stipulations concerning *voir dire* will be forthcoming. The rest of the transcript up to the end of closing arguments is required."

[9] In *Draper*, 372 U. S., at 496–497, we remarked:

"Petitioners' contentions in the present case were such that they could not be adequately considered by the State Supreme Court on the limited record before it. The arguments about improper foundation for introduction of the gun and coat, for example, could not be determined on their merits—as they would have been on a nonindigent's appeal—without recourse, at a minimum, to the portions of the record of the trial proceedings relating to this point. Again, the asserted failure of proof with respect to identification of the defendants and the allegations of perjury and inconsistent testimony were similarly impossible to pass upon without direct study of the relevant portions of the trial record. Finally, the alleged failure of the evidence to sustain the conviction could not be determined on the inadequate information before the Washington Supreme Court."

something less than a complete transcript would suffice. Here the City of Chicago urges that the Illinois procedures for a "Settled" or "Agreed" statement may provide adequate alternatives. The city also argues that even if a verbatim record is required, less than a complete transcript may assure fair appellate review. We cannot address these questions, since the record before us contains only the parties' conflicting assertions; so far as appears, neither of the Illinois courts below regarded resolution of the dispute to be relevant in light of Rule 607 (b). That this was the view of the Circuit Court is clear. The order of the Supreme Court, however, may not have been based on the rule, but on the ground that appellant had the burden of showing that the alternatives of a "Settled" or "Agreed" statement were inadequate. We hold today that a denial of appellant's motion, either on the basis of the rule, or, in the context of his grounds of appeal, on the basis that he did not meet the burden of showing the inadequacy of the alternatives, would constitute constitutional error.

We are informed that appellant's appeal from his conviction has been docketed in the Illinois Supreme Court and that its disposition has been deferred pending our decision of this case. We therefore vacate the order of the Illinois Supreme Court and remand the case to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion but add these observations chiefly to underscore that there are alternatives in the majority of cases to a full verbatim transcript of an entire trial. The references to what was said in *Draper* v. *Washington*, 372 U. S. 487 (1963), emphasize the duty of counsel as officers of the court to seek only what is

needed. In most cases, unlike this one, the essential facts are not in dispute on appeal, or if there is dispute it centers on certain limited aspects of the case. One need only examine briefs in appeals to see that at the appellate stage the area of conflict on the facts is generally narrow.

Every busy court is plagued with excessive demands for free transcripts in criminal cases.[1] My own experience over the years indicates that privately employed counsel are usually spartan in their demands because the client must pay his own costs. Unfortunately one consequence of the advent of the Criminal Justice Act and state counterparts is that when costs are paid by the public, counsel are sometimes profligate in their demands,

[1] It is not the increase in number of requested transcripts alone which has resulted in delay. The delay has been caused by the combination of this increase with the failure of the system to increase its ability to produce transcripts. Cf. Committee of Section of Criminal Law of American Bar Association, Appellate Delay in Criminal Cases: A Report, 2 Am. Crim. L. Q. 150, 153 (1964). In the typical situation in federal courts the reporter is an independent contractor selected by the Government to make a verbatim record of the entire proceedings. In some States the court reporter is an employee. In most systems the reporter independently contracts with the parties to transcribe the record at a certain fee per page. Although courts have supervisory power over the reporter, administration of the transcribing of the notes is often left largely if not completely to the discretion of the reporter. See generally Administrative Office of the United States Courts, The Court Reporting System in the United States District Courts 7–47 (1960). With the enormous increase in criminal cases, reporters are often unable to keep up with the demand for transcripts and at the same time continue with regular reporting. Some reporters fail to make adequate arrangements for stenographers to transcribe their notes, which can be done by someone other than the reporter. The failure of courts to give adequate supervision to the work of court reporters accounts for much of the delay in processing appeals. Courts have an obligation to exercise sufficient oversight of reporters to ensure that proceedings are transcribed with dispatch.

or yield their professional judgment to the client's desires. This is more than a matter of costs. An affluent society ought not be miserly in support of justice, for economy is not an objective of the system; the real vice is the resulting delay in securing transcripts and hence determining the appeal. When excessive demands are made by an appellant in order to postpone the day when the appeal is finally determined, because, for example, he is at liberty pending appeal,[2] a lawyer who cooperates is guilty of unprofessional conduct.

I quite agree with MR. JUSTICE BRENNAN that "a full verbatim record where that is necessary . . ." should be provided but judges and lawyers have a duty to avoid abuses that promote delays.

MR. JUSTICE BLACKMUN, concurring.

I concur in the opinion and judgment of the Court. I merely add an observation: The record indicates that in 1969, when the charges were brought against the appellant and he asserted his indigency, he was a third-year student in New York University Medical School. Perhaps, in the intervening two years, the appellant has completed his professional training. Perhaps by now he is even licensed and is earning his living. If so, these will be factors to be considered by the Illinois courts on remand.

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[2] See American Bar Association, Project on Standards for Criminal Justice, Criminal Appeals § 2.3 (Approved Draft 1970), which concludes that "[a]utomatic release pending appeal" is one of the "unacceptable inducements to taking appeals." See also *id.*, § 2.5.

END OF CASE